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Nadia E. Nedzel

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Nadia E. Nedzel, LL.M.[*]

I. INTRODUCTION

Henry II of England encouraged the use of litigation as a way to decrease lawlessness in an unruly bunch of Anglo-Saxons, thus founding the common law. On a domestic level, litigation remains an important means of resolving conflict without resorting to force or violence. The same principle applies on a global level. This article argues that trade remedies, problematic though they may be, provide a legal framework in which litigation can and must be promulgated to protect the benefits of a global market economy.

Though trade remedies are anti-market by nature and problematic in application, their negative effects are limited, because the underlying premise of the General Agreement on Tariffs and Trade ("GATT") is one of free trade, and because protectionist remedies are deliberately cumbersome and expensive. Major market participants bring such actions as another competitive tool in their arsenal, and use that tool primarily during periods of economic recession. Once a local economy begins an upsurge, such remedies either become irrelevant due to rising prices or are eventually repealed based on market demand. While the costs of such proceedings are exorbitantly high for all parties involved directly or indirectly—petitioners, respondents, governmental agencies, and consumers—those fees can be considered as the cost of doing business. The anti-market effects of trade remedies are offset by the gain in international transparency, accountability, and predictability.

There are essentially four positions one can take with respect to the

[*] Assistant Professor, Southern University Law Center. I would like to thank Southern University Law Center and Chancellor Freddie Pitcher for the summer research stipend that made this article possible, as well as the members of the faculty for their support and understanding during my time of need following Hurricane Katrina.

role of law in a global economy: 1) mercantilism, 2) doctrinaire libertarianism, 3) doctrinaire socialism, and 4) enlightened political economy. Under mercantilism, law has no role in a global economy. This is the Hobbesian "state of nature" in which one views the global economy like a game of Monopoly where the object is for a country to bankrupt its competitors; the economy is an extension of national political or ideological goals.[1] Like mercantilism, those who espouse doctrinaire libertarianism (otherwise known as anarcho-capitalism) similarly believe that law has no role in a global economy. Doctrinaire libertarians see free-market capitalism as the basis for a free society and advocate that the state, law enforcement, courts, national defense, and all other governmental services should be replaced by voluntarily-funded competitors in a free market, and that personal and economic activities be completely deregulated.[2]

In contrast with mercantilists and doctrinaire libertarians, doctrinaire socialists believe that law should have a dominant role in a global economy. Under this view, the role of political and legal institutions is to create a planned economy in which the means of production are owned collectively and equality is given a high priority.[3] Enlightened political economists similarly believe that legal institutions have an important role in a global economy. However, rather than dominating that economy with an eye towards forcing equality, they believe that the role of law and legal institutions such as the World Trade Organization ("WTO") is to help move a world defined by diverse political entities in the direction of greater free trade. The foundational premise of the WTO is that of enlightened political economy,[4] and this article will be developed with the same approach.

Part II of this article begins with an explanation of GATT's basic operating principles, what effect the operation of those principles has had on the global trade of goods, and introduces the policies underlying the

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[1] "Mercantilism is an economic theory that holds that the prosperity of a nation depends upon its supply of capital, and that the global volume of trade is 'unchangeable.'" Wikipedia, *Mercantilism*, http://en.wikipedia.org/wiki/Mercantilism (last visited Mar. 8, 2008). Thus, the ruling government should play a protectionist role by encouraging exports and discouraging imports through the use of tariffs. *Id.*; *see also* Daniel J. Gifford, *Trade and Tensions*, 15 MINN. J. INT'L L. 297 (2006) (discussing residual mercantilism in international relations as justification for international trade rules).

[2] *See* MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 159–98 (1998); Walter Block, *Rejoinder to Holcombe on the Inevitability of Government*, 21 J. LIBERTARIAN STUD. 49 (2007); Walter Block, *Anarchism and Minarchism; No Rapprochement Possible: Reply to Tibor Machan*, 21 J. LIBERTARIAN STUD. 91 (2007).

[3] *See* GRAHAM BANNOCK, RON BAXTER & EVAN DAVIS, *Socialism*, *in* DICTIONARY OF ECONOMICS 360, 360 (4th ed. 2003).

[4] *See* World Trade Organization, Understanding the WTO: Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Mar. 8, 2008); *see also* Donald Boudreaux, *Dobbs's Disciples*, TCS DAILY, Apr. 17, 2006, http://www.freerepublic.com/focus/f-news/1616779/posts (last visited Mar. 8, 2008).

three trade remedies. Part III outlines the legal requirements of the WTO trade remedies (antidumping, countervailing duties, and safeguards), as well as the WTO Dispute Resolution process and its impact on trade remedy disputes. Part IV provides a history of how the three trade remedies developed, including their implementation in the United States. Part V gives a numerical analysis of the past decade of antidumping, countervailing duties, and safeguards actions as reported to the WTO. Part VI discusses some of the criticism that has been leveled at trade remedies, particularly antidumping. Finally, Part VII provides a contextual defense of unfair trade remedies, concluding that while they have little or nothing to do with unfair trade, their use as a limited political 'escape hatch' against a background norm of freer trade has ultimately resulted in freer global trade, and that limitation should be extended to include stronger limitations on agricultural subsidies.

II. CONTEXT: GATT'S FREER TRADE PRINCIPLES AND UNFAIR TRADE REMEDIES

A. The World Trade Organization and Freer Trade

Consistent with the goal of freer trade, the World Trade Organization, established in 1994, is based on a presumption that market economies help establish stronger nations, and it is focused on reducing trade barriers (such as tariffs) between nations. The primary function of the WTO is to set rules of trade between nations.[5] It is the vehicle of enactment for several multinational agreements, of which the GATT treaty is one.[6] In setting up a trade regime, the WTO's stated primary goal is to encourage international commerce: although trade does not ensure peace, it discourages war.[7] Thus, the goal of the WTO is to encourage trade among Members by setting predictable rules, encouraging freer trade and competition, and providing benefits for less developed nations.[8] The WTO does not mandate free trade,

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[5] *See* World Trade Organization, The WTO . . . In Brief, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm [hereinafter WTO In Brief] (last visited Mar. 8, 2008).

[6] See Understanding the WTO: Principles of the Trading System, *supra* note 4.

[7] *See, e.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Debra Winthrop eds., trans., University of Chicago Press 2000) (1840); BARON DE CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. 20, ch. 2 (Anne M. Cohler, et. al. eds., Cambridge University Press 1989) (1748); STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 297 (Viking Press 2002); *All Free Traders Now?*, ECONOMIST, Dec. 7, 1996, at 21 (quoting Richard Cobden, "[f]ree trade. . .is God's diplomacy, and there is no other certain way of uniting people in the bonds of peace"); *see generally* IMMANUEL KANT, *To Perpetual Peace, A Philosophical Sketch*, *in* PERPETUAL PEACE AND OTHER ESSAYS 107, 107–39 (Ted Humphrey trans., Hackett Pub. 1983).

[8] *See* WTO In Brief, *supra* note 5.

but instead establishes a framework of rules enabling WTO Members to progress towards freer trade by reducing tariffs and making voluntary trade concessions. This discourages Members from engaging in certain kinds of trade discrimination against fellow Members.[9]

To use a war-time analogy, assume that before GATT, nations assumed a war-like stance against each other in trade, guarding their borders zealously with raised swords consisting of tariffs, duties, subsidies, and other methods to keep out intruding imports. (Such remains the case with regard to agricultural subsidies, as yet relatively untouched by international accords.)[10] The GATT/WTO mechanism has been a series of world-wide peace-keeping negotiations that work by getting nations to gradually lower their swords: "I'll lower my sword 15%, if you lower yours 14%." Typically, the WTO encourages developed countries to make larger concessions than developing or lesser developed countries are making. The war analogy works here as well: the bigger, stronger countries initially agree to lower their swords (import tariffs and duties). Then, in response to good faith by the larger countries, the smaller countries gradually lower their tariffs as well.

There are several reasons for encouraging freer trade. Tariffs and other trade barriers are akin to hidden taxes that increase prices to consumers in developed countries, discouraging purchasers from buying the taxed goods, and discouraging potential importers from marketing lower-cost goods.[11] Thus, in developed countries, these hidden taxes burden the poor and are "deadweight losses," which merely raise the price of a good.[12] Freer trade is beneficial for developing countries as well as for developed states. In developing countries, the effect of trade barriers may be worse: typically, developing countries produce lower priced goods than do developed countries, but developed countries' tariffs discourage the exportation of those lower priced goods.[13] Moreover, developing countries' internal barriers against importations from other countries cause their economies further harm. Thus, both developed and developing countries benefit from freer trade with lower prices for consumers.

B. Demonstrated Effect of GATT's Freer-trade Policies

World Bank research suggests that openness to global trade has promoted economic equality and reduced poverty: 800 million people escaped from poverty in the 1990s, during a period of globalization

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[9] JAMES BACCHUS, TRADE AND FREEDOM 39 (Cameron May 2004).

[10] *See infra* text accompanying notes 290–300.

[11] *See* BACCHUS, *supra* note 9, at 214.

[12] *Id.*

[13] *See id.* at 215.

accelerated by GATT and the WTO's lowering of trade barriers.[14] Those developing countries that have been open to trade have grown faster than those that have isolated themselves economically, and this greater openness to international trade, rather than making things worse, has narrowed the gap between rich and poor countries.[15] According to the Organization for Economic Cooperation and Development ("OECD"), developing countries benefit the most from liberalized trade. In 1999, OECD figures indicated that further trade liberalization enabled India's Gross Domestic Product ("GDP") to grow by 9.6%, China's by 5.5%, and Sub-Sahara Africa's by 3.7%.[16]

India is a prime example of the benefits of free trade for a developing nation. In 1951, India withdrew from international trade and raised tariffs and taxes. As a consequence, its economic growth shrunk from 7.7% a year in 1961 to 4% in 1980, and it became one of the worst-performing developing economies of that era.[17] Then, after four decades of state planning, India began embracing a free-market economy in 1991.[18] Since the economic reforms of 1991, parts of India have rapidly moved from poverty to prosperity and much of the nation has emerged as a vigorous free-market democracy. Poverty in India has not been eradicated, but India now ranks as one of the ten largest emerging markets in the world, with the largest middle class.[19]

Since the enactment of GATT after World War II, tariffs on goods among the 149 WTO Members have been reduced from high double-digits to less than 4%.[20] As a result of this reduction, global trade has increased six-fold,[21] and merchandise exports have grown by 6% annually since

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[14] WORLD TRADE ORGANIZATION, THE MULTILATERAL TRADING SYSTEM: 50 YEARS OF ACHIEVEMENT 23 (1998); David Dollar & Aart Kraay, *Spreading the Wealth*, FOREIGN AFFAIRS, Jan./Feb. 2002, at 126–27, *available at* http://www2.chass.ncsu.edu/Stephen/dollarkray.pdf.

[15] Dollar & Kraay, *supra* note 14, at 120; *see also* JOHAN NORBERG, IN DEFENSE OF GLOBAL CAPITALISM 54–59 (Cato Institute 2003) (arguing that the 1999 UN Human Development Report's conclusion that global inequality has increased is erroneous because those numbers were not adjusted for purchasing power, and that in fact, inequality between countries has been continuously declining since the 1970s, in accord with figures provided by the Norwegian Institute for Foreign Affairs).

[16] *See* BACCHUS, *supra* note 9, at 215 (citing Mike Moore, Opening Address, WTO Ministerial Conference, Seattle, Washington (Nov. 30, 1999)).

[17] *See* NORBERG, *supra* note 15, at 21.

[18] Bureau of South and Central Asian Affairs, U.S. Dept. of State, Background Note: India, Oct. 2007, http://www.state.gov/r/pa/ei/bgn/3454.htm (last visited Mar. 8, 2008).

[19] *See* NORBERG, *supra* note 15, at 21–23. While India is a success story in its move away from a socialist controlled economy to one based on a free market, unfortunately Russia's history has not been as successful due to difficulties in establishing the rule of law.

[20] WORLD TRADE ORGANIZATION, *supra* note 14, at 5.

[21] *See* WTO In Brief, *supra* note 5.

1950.[22] In fact, the result has been a precipitous increase in global trade of merchandise, from $6 trillion in 1996[23] (two years after the creation of the WTO[24]) to in excess of $10 trillion in 2006.[25] Furthermore, the percentage of people living at or below the poverty level has decreased from 44% of the world's population in 1980 to 13% by the end of 2002.[26]

Thus, the GATT/WTO freer trade policies have clearly been beneficial to both developed and developing nations.[27] In encouraging freer trade among nations, however, the WTO rules reflect a concern that Members may on occasion need to defend individual industries against unfair trade or may need to protect a particularly vulnerable industry, and they therefore provide three trade remedies: three causes of action a country can use to defend its industries as an alternative to trade barriers and trade wars.

C. WTO Basic Rules

WTO Member obligations are based on three basic rules: 1) binding concessions, 2) most-favored nation treatment, and 3) national treatment. Binding concessions means that if a Member voluntarily concedes to lower its tariff barriers to worldwide trade, then those concessions are binding.[28] Most favored nation treatment means that a Member must give the same

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[22] Martin Wolf, *Trade Expansion Remains the Engine of Growth*, FIN. TIMES, Nov. 29, 1999, at 21.

[23] WORLD TRADE ORGANIZATION, WTO ANNUAL REPORT 1996 10 (1996).

[24] Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125, 1143 (1994).

[25] WORLD TRADE ORGANIZATION, WTO ANNUAL REPORT 2006 4 (2006).

[26] *See* UNITED NATIONS DEVELOPMENT PROGRAM, UNITED NATIONS, HUMAN DEVELOPMENT REPORT 1997 12 (Oxford University Press 1997) (observing that world poverty has fallen more during the past 50 years since the creation of GATT than during the preceding 500); SURJIT S. BHALLA, IMAGINE THERE'S NO COUNTRY: POVERTY, INEQUALITY, AND GROWTH IN THE ERA OF GLOBALIZATION (Institute for International Economics 2002) (finding that worldwide poverty has fallen precipitously).

[27] Least developed nations ("LDNs"), have been unable to participate fully in the benefits provided by GATT because of several continuing problems. One problem is that their economies are largely based on agriculture, and their production cannot compete with the heavily subsidized commodities produced by developed worlds. Kevin C. Kennedy, *The Incoherence of Agricultural, Trade, and Development Policy for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?*, 14 KAN. J. L. & PUB. POL'Y 307, 310 (2005); *see also* Uche U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the "New" International Trade Regime*, 20 BERK. J. GENDER L. & JUST. 75, 128–30 (2005) (discussing barriers faced by women farmers in least developed and developing countries). Other problems include severe debt, disease, and lack of necessary infrastructure. *See* Kennedy, at 338; Uche U. Ewelukwa, *Special and Differential Treatment in International Trade Law: A Concept in Search of Content*, 79 N.D. L. REV 831, 863 (2003).

[28] BACCHUS, *supra* note 9, at 40.

treatment to all trading partners that are Members of the WTO, and must not discriminate among different foreign producers of like imported products.[29] In other words, once a Member country submits its yearly schedule of tariffs to the WTO, imports of those goods from any other member may not be subjected to duties in excess of those basic tariffs.[30] Furthermore, national treatment prevents the favoring of domestic goods over foreign goods once a foreign good has entered the domestic market.[31]

D. Exceptions to Freer Trade: the WTO's Three Trade Remedies

In theory, the three trade remedies—antidumping measures, countervailing duties, and safeguard measures—are WTO-sanctioned measures a member country can use to temporarily protect a vulnerable domestic industry from competition by imposing duties on a particular product above and beyond the amount listed in its schedule.

No measure is to be implemented without a WTO-prescribed investigation by the domestic government into whether the measure is justified under rules set by the WTO.[32] The investigation is in fact a detailed litigation procedure conducted by a government agency, and requires that the agency give full hearing to both the plaintiff domestic industry and the defendant importers before reaching a decision. Analogizing to United States legal terminology, WTO rules require due process before any such extraordinary tariffs may be imposed. The decision must be justified on the basis of the evidence adduced in the investigation.[33] In all three cases, when the measure is put into place, additional duties or tariffs are superimposed above and beyond those the importing country agreed to in its WTO schedule, so that the domestic industry is no longer

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[29] *Id.* at 41.

[30] There are certain exceptions. For example, countries within a region may set up a free trade agreement that does not apply to goods from outside the group. *Id.* NAFTA is one such free trade agreement.

[31] *Id.*

[32] *See generally* World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15. 1994, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Anti-dumping Agreement]; *id.* at 1154 (Annex 1A, Multilateral Agreements on Trade in Goods—Results of the Uruguay Round), *available at* http://www.wto.org/english/docs_e/legal_e/05-anx1a.pdf; *see also* World Trade Organization, Agreement on Subsidies and Countervailing Measures, art. 1 (Apr. 15, 1994), *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter CVD Agreement]; World Trade Organization, Agreement on Safeguards, art. 10 (Apr. 15, 1994), *available at* http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf [hereinafter Safeguards Agreement]; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, art. 3.2, 33 I.L.M. 1125, 1199–1200 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/03-fa.pdf.

[33] *See supra* note 32.

threatened or injured by lower import prices.[34] Thus, all three measures result in a higher domestic price for the particular product at issue and are anti-competitive in nature. A number of economists argue, therefore, that such measures are inherently unproductive and should not be used.[35]

The purported justification for the imposition of such trade remedies is that they are needed to correct inefficiencies in the free market. The theory behind antidumping and countervailing duty laws is quite simple: it suggests that producers of merchandise in foreign lands are able to take advantage of protected home markets to produce and export goods at artificially low prices.[36] When "dumped" (cut-price export) products are sold in the target country, their low prices cut into the profits of domestic like products, thereby harming the local industry. Subsidized products—such as imports whose low prices reflect financial support provided by the home government—cause similar harm to a target industry by distorting the local market: local manufacturers conclude that they cannot produce the product at a competitive price and they decrease or cease production. Thus, both antidumping and countervailing duties protect a domestic industry from imported products that are being sold at what is concluded to be an unfairly low price by certain specific importers from certain specific countries. Antidumping measures protect a domestic industry from imported products that are being sold at predatory prices below production cost. Countervailing duties protect from imported products sold at low prices that are the result of subsidization by the foreign government.

Both antidumping and countervailing duty measures are justified under WTO rules as an exception to the freer-trade policy because they theoretically protect a domestic industry from the unfair trade practices of one or more specific countries. Because they are an exception to the scheduled tariffs, however, the WTO includes a built-in "sunset" or termination rule: antidumping tariffs and countervailing duties are to be reviewed regularly and terminated when no longer needed because they otherwise artificially inflate the price of the product at issue to domestic consumers.[37]

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[34] *See, e.g.*, Antidumping Agreement, *supra* note 32, art. 3.1 ("determination of injury. . . .shall be based on positive evidence. . ."); CVD Agreement, *supra* note 32, art. 11.2 (an application unsubstantiated by relevant evidence is insufficient); Safeguards Agreement, *supra* note 32, art. 4.1 (b) ("a determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture, or remote possibility. . .").

[35] *See, e.g.*, Walter Block & Michael Gries, *Predator: Anti-Dumping Regulations*, CONSENT 29, Sept. 1998, at 9–10; Robert W. McGee & Walter Block, *Ethical Aspects of Initiating Anti Dumping Actions*, 24 INT'L J. SOC. ECON 599, 599–608 (1997).

[36] Peter D. Ehrenhaft & Charlotte G. Meriwether, *The Trade Agreements Act of 1979: Small Aid for Trade?*, 58 TUL. L. REV. 1107, 1116–17 (1984).

[37] Antidumping Agreement, *supra* note 32, art. 11.3; CVD Agreement *supra* note 32 art.

The third trade protection mechanism provided under WTO rules, the safeguard measure, is designed to temporarily protect a weak, vulnerable domestic industry from *all* competition for a limited period to provide a domestic industry with a temporary monopoly while it improves its international competitiveness.[38] During the period of time the safeguard measure is in effect, all imports of similar products from any country face an extra tariff.[39] The theoretical justification for a safeguard measure is that it provides a broad tool to help a struggling home industry, to be used only in very limited circumstances, and only for a maximum of four years, during which time it must be phased-out.

Since the inception of the WTO in 1995, and especially in the years 1998-2003, the use of the three unfair trade measures—particularly antidumping measures—mushroomed, and developing countries are now initiating more antidumping measures than are developed countries.[40] While developed countries such as the United States and the European Union still have more measures in place, the larger and more successful developing countries such as China, India, and Mexico, are quickly catching up.[41] Commentators in 1997 predicted that one of the remedies, antidumping, would become the "weapon of choice for import protection," used much more extensively than the others,[42] and this in fact has proven to be the case.[43]

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[38] Safeguards Agreement, *supra* note 32, art. 2.2 ("Safeguard measures shall be applied to a product begin imported irrespective of its source.").

[39] *Id.*

[40] *See infra* Graph 1 based on information provided by the World Trade Organization. COMM. ON ANTI-DUMPING PRACTICES, WORLD TRADE ORGANIZATION, WTO REPORT (2006) OF THE COMM. ON ANTI-DUMPING PRACTICES, G/L/791 (Oct. 27, 2006), *available at* http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [hereinafter ANTI-DUMPING COMMITTEE REPORT].

[41] COMM. ON ANTI-DUMPING PRACTICES, WORLD TRADE ORGANIZATION, REPORT (2005) OF THE COMM. ON ANTI-DUMPING PRACTICES, ANNEX D, G/L/758 (Nov. 2, 2005), *available at* http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (indicating that for the 2004–2005 period, while the European Communities reported 152 preliminary and final anti-dumping actions and the United States reported 351, India reported fifty-nine, China thirty-nine, and Mexico fifty-five).

[42] Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49, 53 (1997).

[43] *Compare* ANTI-DUMPING COMMITTEE REPORT, *supra* note 40 (indicating that anti-dumping measures in force totaled 1099 in 2006), *with* COMM. ON SUBSIDIES AND COUNTERVAILING MEASURES, WORLD TRADE ORGANIZATION, REPORT (2006) OF THE COMM. ON SUBSIDIES AND COUNTERVAILING MEASURES, ANNEX D, G/L/798 (Nov. 8, 2006), *available at* http://www.wto.org/english/tratop_e/scm_e/scm_e.htm (indicating 79 countervailing duty actions), *and* COMM. ON SAFEGUARDS TO THE COUNCIL FOR TRADE IN GOODS, WORLD TRADE ORGANIZATION, REPORT (2006) OF THE COMM. ON SAFEGUARDS TO THE COUNCIL FOR TRADE IN GOODS, ANNEX 2, G/L/795 (Nov. 3, 2006), *available at*

III. TRADE REMEDIES AND THE WTO LEGAL GUIDELINES

Each WTO member nation adopts its own version of antidumping, countervailing duty, and safeguards laws; nevertheless, the WTO Antidumping, Subsidies and Countervailing Measures, and Safeguards Agreements set certain detailed parameters for such laws. These parameters are quite complex, and only a summary is offered below.

A. Antidumping Laws

Under the Antidumping Agreement, a WTO Member has the right to apply an antidumping measure against an import that is dumped in its domestic market *only* when the dumped import causes or threatens to cause material injury to a domestic industry. Thus, the Member government must investigate two separate issues: 1) whether the import was dumped, and 2) whether the dumped import caused or threatened to cause material injury.

1. Preliminary Procedure

The process begins when a domestic industry submits a written antidumping petition or *application*. Domestic producers whose collective output constitutes at least 25% of domestic like product must support that application, submitted by or on behalf of a domestic industry.[44] The application must also "substantiate" its allegations with evidence. Thus, it must include not only the identity of the industry and a list of all known domestic producers, but also a description of the volume and value of domestic production, a complete description of the allegedly dumped product including country of origin, and a list identifying each known importer.[45] The application must also include the price of the allegedly dumped product when sold in its home market, the price at which it is being sold as imported, and information on how much product was imported during the period of time covered by the application (i.e. evidence of dumping).[46] In addition to this "dumping" information, the application must include evidence of material injury or threat to cause material injury, as well as detailed evidence that the dumped product caused the injury or

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http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (indicating 11 safeguard definitive measures).

[44] Antidumping Agreement, *supra* note 32, art. 5.4 ("The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25% of the total production of the like product produced by the domestic industry.").

[45] *Id.* art. 5.2 (i)–(ii).

[46] *Id.* art. 5.2 (iii)–(iv).

threat and exclude other possible causes.[47]

2. *Governmental Procedures*

Once an application is made, if the governmental agency determines after preliminary review that it appears to be factually justified, the governmental agency then initiates an investigation and notifies the exporting country's government of the investigation.[48] The investigating agency also notifies all interested parties, giving them ample opportunity to present in writing all evidence they consider relevant, and it sends foreign producer and exporter questionnaires, giving them at least thirty days for reply and granting extensions upon request whenever practicable.[49] Transparency is required: evidence presented by one interested party must be promptly made available to other interested parties participating in the investigation, unless the information is confidential.[50] All interested parties must be given a full opportunity to defend their interests. Where one party provides information that may be of a significant competitive advantage to a competitor, and which it wants the investigating agency to treat as confidential, it must also provide a non-confidential summary thereof that the investigating body can provide to the other interested parties.[51]

3. *Substantive Law: Definition of Dumping and Material Injury*

In addition to detailing specifics of what must be included in an antidumping application, and specifics about procedural requirements, the Antidumping ("AD") Agreement also gives detailed definitions of the two requisite terms: a *dumped product* and requisite *material injury* to a domestic industry. A product is dumped when it is introduced into the commerce of another country at less than normal value, meaning that the export price is less than the comparable price, in the ordinary course of trade, for the same product in its home country.[52] The *margin of dumping* is the difference between the two prices: the home market price per unit (normal value per unit) minus the export price per unit, expressed as a percentage of the normal value. Once the export and home market price are determined, and the margin of dumping calculated, if the margin of dumping is *de minimus* (less than 2%), and the volume of dumped imports accounts for less than 3% of imports, then the investigation must be

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[47] *Id.* art. 3.5.
[48] *Id.* art. 5.5.
[49] *Id.* arts. 6.1–6.1.1.
[50] Antidumping Agreement, *supra* note 32, art. 6.1.2.
[51] *Id.* art. 6.5.1.
[52] *Id.* art. 2.1.

immediately terminated.[53]

Assuming that the product was dumped, and the margin of dumping is greater than *de minimus*, then the presence and extent or absence of injury is determined. To this end, the volume of the dumped imports and the effect of the dumped imports on domestic prices must be determined, as well as the consequent impact of these imports on domestic producers of such prices.[54] The investigating authorities must consider whether there was a significant increase in dumped imports in the time period under investigation, whether there was significant price undercutting by those dumped imports, or whether the dumped imports affected prices either by depressing them to a significant degree or by preventing price increases to a significant degree. Furthermore,

> [t]he examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.[55]

Consequently, the determination of a threat of material injury must be based on facts, and not merely on allegation, conjecture, or remote possibility, and must be supported by solid economic evidence.[56] Before an antidumping measure is employed, the investigation must demonstrate not only material injury or threat thereof to the domestic injury, but also a causal relationship between the dumped imports and the injury.[57]

In sum, in order to impose an antidumping duty, the governmental agency must demonstrate 1) that the imported product was dumped (exported for a significantly lower price than it was or would have been sold for in its country of origin), and 2) that the dumping caused significant injury to domestic industry. Finally, the Antidumping Agreement *requires* WTO members to revoke antidumping measures after five years unless, after a "sunset" review initiated before that date, the agency determines that the measures continue to be necessary to ensure the non-occurrence of dumping.[58]

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[53] *Id.* art. 5.8.
[54] *Id.* art. 3.1.
[55] *Id.* art. 3.4.
[56] Antidumping Agreement, *supra* note 32, art. 3.7.
[57] *Id.* art. 3.5.
[58] *Id.* art. 11.3.

B. Anti-subsidy Measures or Countervailing Duties

If the imported product was not sold below production price, but instead the low export price was enabled by a government subsidy, then the appropriate cause of action is one of anti-subsidy/countervailing duty ("CVD") rather than antidumping. Otherwise, the procedure is quite similar to that of an antidumping claim. Governments subsidize economic activities for many reasons,[59] most of which do not run afoul of the WTO Agreement on Subsidies and Countervailing Measures ("CVD Accord").[60] Governments may use subsidies to diminish economic hardships, or to expand activity in certain sectors: typically, governments give financial support to ailing industries, to stimulate infant industries, and to promote exports.[61] Subsidization may help a home industry or sector; however, a product whose export was subsidized can significantly distort competition in the destination country when it is sold at a price lower than the local equivalent. Theoretically, the effect is similar to that of a dumped product, but the cause is somewhat different. Nevertheless, because the effect is the same, so is the ultimate remedy: an additional duty is levied.

As mentioned previously, only a few types of subsidies are prohibited under the CVD Accord, including subsidies conditioned on export performance or on local content, i.e. subsidies that favor domestic goods over foreign merchandise and imports.[62] Other subsidies can be used as the basis of a Countervailing Duty action if they cause adverse effects on the domestic industry.[63] Permissible subsidies include those encouraging research and development, or subsidizing underdeveloped regions, or compensating domestic industries' efforts to comply with specific environmental regulations.[64] Notably, agricultural subsidies remain widespread and problematic, though due to vociferous demand by developing and least developed countries that such subsidies be discontinued, WTO members have agreed in principle to do so.[65] Because the effect of a subsidized product is similar to that of a dumped one, the

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[59] Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT'L & COMP. L. 689, 702 (1999).

[60] CVD Agreement, *supra* note 32, arts. 3.1, 5–6.

[61] *Id.* art. 8.2.

[62] *Id.* arts. 3.1(a)–(b).

[63] *Id.* arts. 5–6.

[64] *Id.* arts. 8.2(a)–(c).

[65] *See* Stewart, *supra* note 59, at 704. Although WTO members have agreed in principle to prohibit agricultural subsidies, agreement of when and how to do so has not yet been reached. However, pressure from the least developed countries in Africa, who claim that they cannot profitably farm cotton due to large U.S. subsidies, may bring about change. The United States, at the Hong Kong Ministerial conference in December 2005, agreed to terminate its cotton subsidies in an effort to break the stalemate the WTO has experienced with regard to rolling back agricultural subsidies.

provisions of the CVD Accord are very similar to those in the Antidumping Agreement.

1. Definition of Subsidy

The CVD Accord provides that a government may levy a countervailing duty on an imported product that was subsidized by its home government. A subsidy is defined as a financial contribution, and can be in the form of a direct transfer of funds (grant, loans, equity infusion), or government revenue foregone or not collected (i.e. tax credits), the provision of goods or services other than general infrastructure, or the purchase of goods, or the making of payments to a funding mechanism, or any other form of income or price support.[66] Thus, any subsidization of an industrial product in such a way as to specifically encourage its exportation or disfavor imported components in its production is prohibited.[67] If an importing country finds that an import has been impermissibly subsidized and has caused injury to or seriously prejudiced the interests of a domestic industry, it can levy a countervailing duty to compensate for the subsidization.[68]

2. Countervailing Duty Procedure

As with antidumping proceedings, a CVD application must include sufficient evidence of the existence of a subsidy, its amount (if possible), injury, and a causal link between the subsidized imports and the alleged material injury.[69] As with an antidumping application, a CVD application must be supported by producers of at least 25% of domestic production,[70] must list all known domestic producers,[71] and must describe the volume and value of domestic production of the like product.[72] It must also contain a complete description of the allegedly subsidized product,[73] the names of the country or countries of origin,[74] and the identity of each known exporter or foreign producer,[75] as well as evidence with regard to the existence,

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[66] CVD Agreement, *supra* note 32, art. 1.1.

[67] *Id.* art. 3.1.

[68] *Id.* art. 5.

[69] *Id.* art. 11.2.

[70] *See id.* art. 11.4 ("[N]o investigation shall be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced by the domestic industry.").

[71] *Id.* art. 11.2(i).

[72] CVD Agreement, *supra* note 32, art. 11.2(i).

[73] *Id.* art. 11.2(ii).

[74] *Id.*

[75] *Id.*

amount, and nature of the subsidy.[76] Finally, it must provide evidence of the alleged injury, including information on any increase in volume of the allegedly subsidized imports, the effect of the imports on prices of domestic like product, and the consequent injury to (or threat of injury) to the imports on the domestic industry.[77]

Once the application is filed, the domestic governmental agency must investigate the information provided, giving all interested parties notice and ample opportunity to reply, following procedures similar to those detailed in the antidumping provisions.[78] As with the antidumping rules, the CVD Accord includes a five-year sunset review, requiring that any countervailing duty be removed after five years unless it is found that the expiry of the duty would be likely to lead to a continuation or recurrence of subsidization and injury.[79]

C. Safeguards

The WTO Agreement on Safeguards provides that a Member may apply a safeguard measure to protect a product only once the Member has determined through investigation that 1) the product is being imported into its territory in such increased quantities as to 2) cause or threaten to cause *serious injury* (a higher standard than *material injury*) to the domestic industry.[80] Once this is established, safeguard measures may be applied only to the extent necessary to prevent or remedy serious injury and facilitate adjustment, and must be applied to imports irrespective of their sources (in other words, the safeguarding government may not allow some imports and not others).[81]

As with the antidumping and countervailing duty processes, safeguard investigation procedures must have been previously established and made public, including reasonable public notice to all interested parties, and confidential information shall be treated as such.[82] A *serious injury* is defined as a "significant overall impairment" in the domestic industry's position, and a *threat of serious injury* means a clear and imminent threat, both must be based on facts, not allegation, conjecture, or remote possibility.[83] Thus, the investigation must encompass the rate and amount of increase in imports of the product in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the

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[76] *Id.* art. 11.2(iii).
[77] *Id.* art. 11.2(iv).
[78] *See generally* CVD Agreement, *supra* note 32, art. 12.1.
[79] *Id.* art. 21.3.
[80] Safeguards Agreement, *supra* note 32, art. 2.1.
[81] *Id.* art. 2.
[82] *Id.* art. 3.1.
[83] *Id.* art. 4.1(a)–(b).

level of sales, production, productivity, capacity utilization, profits and losses, and employment.[84]

The amount of proof required, as well as due process procedural requirements, are parallel to AD and CVD requirements, but there are more stringent time limitations. Article 7 of the Safeguard Agreement stipulates that a safeguard measure be in place "only for such period of time as may be necessary to prevent or remedy" the serious injury, and that period is not to exceed four years, unless reevaluation procedures show that it continues to be necessary, in which case it can be extended for an absolute maximum of an additional four years.[85]

D. WTO Remedies for the Remedies: Dispute Resolution

Once a WTO member has completed the internal litigation process and put a trade remedy in place, if the affected exporting country believes the remedy is unjustified, it can pursue an appeal either through the mechanisms provided under the importing country's law, or through the WTO Dispute Settlement Procedure. The WTO procedure is designed to be completed within fifteen months, even including an appeal.[86] The process begins with a Member's complaint to the WTO's Dispute Resolution Body.

Once a complaint has been lodged with the WTO, the first sixty-day stage consists of confidential consultations, conciliation, and mediation between the two governments, because mutually acceptable solutions are preferred over the litigation process provided in the GATT Understanding on Rules and Procedures Governing the Settlement of Disputes.[87] If consultation fails, the complaining government can then seek a panel review of the matter, a process which can take up to six months. A Panel consists of three to five experts from different countries who are selected, preferably by the parties to the dispute, from a list provided by the DSB.[88] After a series of hearings and drafts, the Panel issues a report stating its opinion of which party is right, and which is wrong under the pertinent Agreement, and why.[89] The Panel Report is then passed to the Dispute Settlement Body, which can only reject the Report by consensus.[90]

After the Panel Report has become final, either party can appeal it to the Appellate Body, a permanent quasi-judicial body consisting of seven experts in law and international trade who are appointed for four-year

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[84] *Id.* art. 4.2(a).

[85] *Id.* art. 7.1–7.2.

[86] *See* Understanding the WTO, *supra* note 4.

[87] Antidumping Agreement, *supra* note 32, art. 305 (Annex 2, Legal Instruments—Results of the Uruguay Round).

[88] *Id.* art. 6–8.

[89] *Id.* art. 11–16.

[90] *Id.* art. 16 (4).

terms.[91] Once the Appellate Body issues its decision, if the defendant Member has lost, it is given a reasonable period of time to bring its law and tariffs into compliance with the decision.[92] If it fails to do so, then it must enter into negotiations with the complaining country to determine mutually acceptable compensation, such as pertinent tariff reductions.[93] If the defendant Member still fails to take action within twenty days, then the complaining Member can ask the Dispute Settlement Body for the authority to impose limited trade sanctions or retaliation in the form of suspending concessions, or other obligations it has towards the defendant Member in the same industrial sector.[94]

E. The Impact of the Dispute Resolution Process

A large proportion of WTO Panel and Appellate Body casework deals with antidumping and CVD measures. The decisions, in particular those of the Appellate Body, are long, highly detailed, and studied carefully by scholars, attorneys, and regulative bodies. Although different mechanisms are used to choose them, each decision is written by jurists from several different country-members of the WTO, and since the majority of members are from civil rather than common-law jurisdictions, the decisions are crafted not with an eye towards precedential value, but instead with a narrow understanding that their only job is to interpret the AD Agreement and whether it was properly applied. Consequently, while these decisions do not have the consistency that one would expect in a common law jurisdiction, they do have a jurisprudential effect, and are highly influential. For example, the 1916 Antidumping Act, the Byrd Amendment, certain cotton subsidy provisions, and the U.S. steel safeguard measure were all repealed or agreed to be scaled back [95] after the Appellate Body found them

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[91] *Id.* arts. 17(1)–(3).

[92] *Id.* art. 21(3) ("At a DSB meeting held within thirty days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB.").

[93] Antidumping Agreement, *supra* note 32, art. 22 (2).

[94] *Id.* The justification for preferring retaliation within the same sector is that this provides a limitation on the scope of the trade dispute between the affected parties and will thereby prevent a wider trade war. However, some have criticized the effectiveness of such sanctions. *See, e.g.*, Holger Spamann, *The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice*, 9 J. INT'L ECON. L. 31, 34 (2006) (arguing that the sanction measures as calculated and imposed are so imprecise as to be arbitrary); *but see* Daniel Kalderimiss, *Problems of WTO Harmonization and the Virtues of Shields over Swords*, 13 J. MINN. J. GLOBAL TRADE 305, 312 (2004) (acknowledging that when a Member faces sanctions, it also faces immense international political pressure to resolve the WTO issue).

[95] *See* 1916 Antidumping Act, 15 U.S.C. § 72 (2000) *repealed by* Pub. L. No. 108-429, § 2006(a), 118 Stat. 2597 (2004); *see also* Continued Dumping and Subsidy Offset Act of 2000 ("The Byrd Amendment"), 19 U.S.C. § 1674(c) (2000) *repealed by* Pub. L. No. 109-171 § 7601(a), 120 Stat. 154 (2006).

to be inconsistent with the U.S. WTO obligations.[96] Initially, it was feared that the hostility of most WTO member nations to U.S. antidumping practices would result in decision after decision overturning U.S. decisions, but that has not been the case.[97] Instead, of a total of 115 WTO complaints filed against the United States between 1995 and October 2006, the United States prevailed on core issues in fourteen cases, lost in thirty cases, and the rest are either inactive or incomplete. In terms of the seventy-nine complaints filed by the United States, it prevailed in twenty-six complaints, lost in four, and the rest were either resolved or became inactive.[98] Furthermore, even in the first few years, it was not only the United States that had been found to have run afoul of the Antidumping Agreement, but also Argentina, the European Union, Egypt, Guatemala, Mexico, and Thailand.[99] Nevertheless, the overall tenor of the decisions has been a

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[96] *See* Appellate Body Report, *European Communities-United States—Antidumping Act of 1916*, WT/DS136/AB/R and *Japan-United States—Antidumping Act of 1916*, WT/DS162/AB/R (Aug. 28, 2000); Raj Bhala, *New WTO Antidumping Precedents Part II: Causation, Injury Determinations, and Penalties*, 6 SING. J. INT'L & COMP. L. 980, 1012–17 (2002) (discussing the reports); Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/217_234_abr_e.pdf (concerning the Byrd Amendment). In addition to violating WTO obligations, the Byrd Amendment was repealed as harmful to U.S. businesses because by subsidizing the cost of antidumping and other trade remedy proceedings, it provided an incentive for more U.S. businesses to pursue additional antidumping and subsidy complaints. *See* Letter from Douglas Holtz-Eakin, Director of the Congressional Budget Office to Honorable Bill Thomas of the Comm. on Ways and Means (Mar. 2, 2004), *available at* http://www.cbo.gov/ftpdocs/51xx/doc5130/03-02-ThomasLetter.pdf. Furthermore, the law subsidized the output of some firms at the expense of others, leading to inefficient use of capital, labor, and other economic resources, discouraged settlement of cases, potentially interfered with the ability of U.S. exporters to compete in the global marketplace, and left the United States vulnerable to retaliation against its exports due to the negative Appellate Body finding. *Id.*; *see also* the accompanying Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000. In contrast to the flexibility of the Administration and Congress, however, the judiciary is more likely to hold that Commerce is not bound by WTO Appellate Body decisions. *See, e.g.*, Corus Staal BC v. Dept. of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (under the *Chevron* deference, holding that Commerce's habit of zeroing is reasonable, despite WTO jurisprudence rejecting, and stating that WTO decisions are "not binding on the United States, much less this court."); *see also* Paul Muller Industrie GmBH & Co. v. U.S., 435 F. Supp. 2d 1241 (2006).

[97] Richard O. Cunningham, *Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures*, 31 LAW & POL'Y INT'L BUS. 897, 901 (2000).

[98] UNITED STATES TRADE REPRESENTATIVE, SNAPSHOT OF WTO CASES INVOLVING THE UNITED STATES (Aug. 22, 2006), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file957_5696.pdf.

[99] Panel Report, *Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R (Sept. 28, 2001); Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*,

hypercritical, hyper-technical, narrow-scoped view of when an antidumping measure is justifiably imposed.[100] Typically, both the Panel and the Appellate Body parse specific words of the Agreements closely, scrutinizing the text at a micro-level, to the point that they have been compared to biblical scholars attempting to determine how many angels can dance on the head of a pin.[101] For example, in determining whether the United States had justifiably granted an antidumping duty on RAM Semiconductors from Korea, the Panel examined the U.S. regulation stating that an antidumping measure should not be imposed if the U.S. Commerce Department found it "not likely" that the respondent would sell the merchandise at less than fair value in the future.[102] The Panel held that this regulation was inconsistent with the Antidumping Agreement requirement that the agency question "whether the injury would be likely to continue to recur if the duty were removed . . . ."[103] In essence, the Panel held that "not likely" to reoccur (cup half full) was so different from "likely" to reoccur (cup half empty) that by imposing the antidumping duty, the United States was in violation of the Antidumping Agreement.[104]

While such decisions can be criticized as both hypercritical and resulting in a good deal of confusion as to what antidumping regulations will and will not pass WTO muster, their cumulative effect gives the message that the Antidumping Agreement is a set of provisions to limit and regulate antidumping measures, and not a permission slip to grant them.[105] Thus, since the WTO panels and the Appellate Body view antidumping and countervailing duties skeptically as limitations on the free flow of trade and look for reasons to find an antidumping measure noncompliant, their

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WT/DS141/R (Oct. 30, 2000); Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001); Panel Report, *Egypt—Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (Aug. 8, 2002); Panel Report, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (Oct. 24, 2000); Panel Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Jan. 28, 2000); Panel Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R (Sept. 28, 2000); Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122AB/R (Dec. 3, 2001).

[100] Richard O. Cunningham & Troy H. Cribb, *Dispute Settlement Through the Lens of 'Free Flow of Trade'*, 6 J. INT'L ECON. L. 155, 156 (2003).

[101] *Id.* at 156–57.

[102] *Id.* at 157.

[103] Panel Report, *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or Above from Korea*, ¶ 6.58, WT/DS/99/R (Jan. 29, 1999); *see also* Cunningham & Cribb, *supra* note 100, at 157.

[104] Cunningham & Cribb, *supra* note 100, at 157.

[105] *Id.* at 159.

decisions are consistent with the WTO's underlying goal of encouraging freer trade.[106]

The prospect of imminent sanctions can exert immense political pressure on the defendant Member to repeal trade remedies ruled to be in violation of WTO rules by the Appellate Body. For example, on November 10, 2003, the Appellate Body found that the safeguard measures taken by the United States on behalf of its steel industry were inconsistent with Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards.[107] Sanctions were imposed, however, because the President of the United States issued a proclamation terminating the safeguard measures subject to the dispute within the applicable twenty-day period.[108]

Pursuing an appeal, either through the WTO mechanism or through the importing country's own mechanism, is not the only remedy a country or affected importer can pursue when it objects to the imposition of an unfair trade remedy. Studies indicate that countries may be resorting to "vigilante justice" by imposing retaliatory remedies, possibly because they may be less costly and provide more immediate results than does the WTO Dispute Resolution process.[109]

IV. HISTORY AND DEVELOPMENT OF TRADE REMEDIES LAW

A. Origination of Antidumping Laws

It has only been since the eighteenth century—since the Industrial Revolution brought large-scale production and the active search for wider markets—that subsidization of exports and dumping has been perceived to be a problem.[110] In 1776, in the *Wealth of Nations*, Adam Smith discussed unfavorably the practice of granting bounties on exports.[111] At first, the

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[106] *Id.* at 155 ("[A]ll WTO Panel and Appellate Body ('AB') decisions have viewed dispute settlement through the lens of the fundamental guiding principle, namely that the raison d'etre of the WTO is to reduce (and if possible eliminate) barriers to the free flow of trade.").

[107] Appellate Body Report, *U.S.-Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003) (*adopted* Dec. 10, 2003).

[108] Proclamation No. 7741, 68 Fed. Reg. 68, 483 (Dec. 4, 2003).

[109] Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. LEGAL STUD. 515, 515 (2005).

[110] JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 36 (University of Chicago Press 1966) (1923).

[111] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSE OF THE WEALTH OF NATIONS bk. IV, ch. V (Edwin Cannan ed., University of Chicago Press 1976) (1776) ("I have known the different undertakers of some particular works agree privately among themselves to give a bounty out of their own pockets upon the exportation of a certain proportion of the goods

purpose and effect of such bounties was to reduce the supply available for the domestic market, and thereby raise domestic prices. Shortly afterward, the aim shifted from raising domestic prices to disruption of competition in the foreign market. Thus, originally such measures were predatory in nature.

Because England was the first country to undergo the Industrial Revolution, it is not surprising that the first extensive charges of dumping were directed against its manufacturers.[112] For example, Alexander Hamilton objected to the English government's bounties on the export of sailcloth and linens, and described government-imposed export bounties as the greatest obstacle encountered by new industries in a young United States. He asserted that the export bounties were maintained in order "to enable their [foreign government's] own workmen to undersell and supplant all competitors in countries to which these commodities are sent."[113] His published pleas for protection of American infant industries created such an alarm that English manufacturers banded together to dump products on the American market with the deliberate aim of crushing their American competitors, thus increasing rather than decreasing dumping.[114]

After the War of 1812, Americans again accused English manufacturers of deliberately dumping their products with the aim of crushing new industries.[115] In response to this threat, the U.S. Congress passed a protectionist measure, the Tariff Act of 1816, stating: "The foreign manufacturers and merchants will put in requisition all the powers of ingenuity; will practice whatever art can devise and capital can accomplish to prevent the American manufacturing establishments from taking root and flourishing in their rich and native soil."[116] However, by the latter part of the nineteenth century, with the development of large-scale manufacturing industries in other countries, complaints of English dumping diminished, and dumping charges began to be directed against other countries, including France, Germany, and the United States itself.[117]

By 1914, at the beginning of World War I, German industries practiced export dumping more systematically than any other country. The practice was facilitated by a high protective tariff and the almost complete cartelization of large-scale industry in Germany, thus checking price

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which they dealt in. This expedient succeeded so well that it more than doubled the price of their goods in the home market, notwithstanding a very considerable increase in the produce.").

[112] *Id.*

[113] Alexander Hamilton, *Report on the Subject of Manufactures*, *in* STATE PAPERS AND SPEECHES ON THE TARIFF 31, 32, 92–93 (Cambridge 1893).

[114] VINER, *supra* note 110, at 38.

[115] *Id.* at 39.

[116] 29 ANNALS OF CONG. 964 (1816).

[117] VINER, *supra* note 110, at 48.

competition in the domestic market. As a result, many of the German cartels adopted definitive policies designed to maintain domestic prices at a high level and to offset lower export prices by awarding bounties.[118] The cartels' primary objective was to maintain full production and stable and profitable domestic prices, not necessarily to deliberately harm or destroy industries in other lands. Export prices were set below domestic prices only when needed to maintain aggregate sales and production capacity. Despite this stated policy, however, dumping became the norm, rather than the exception.[119]

Because the remainder of the large industrialized nations of Europe did not have large-scale manufacturing industries operating under unified control as did Germany, and because they enjoyed high tariff protection at home, export dumping was not present nearly to the same degree in Belgium, France, or Austria, though Belgian industries which resorted more or less systematically to dumping included the iron and steel, coal, cement, plate glass, canned vegetables, and earthenware syndicates.[120] French syndicates at times resorted to systematic dumping included iron and steel, pig-iron, flax, hemp, and cotton-yarn, coal, and manufacturers of metal and glass products.[121] Austrian industries sometimes resorted to export dumping wire-tack, enameled ware, cotton-spinning, and petroleum-refineries, as well as iron and steel. Thus, dumping and subsidization of exports was common in large-scale industrialized nations up until World War I.

Canada was the first country to adopt antidumping legislation in 1904, followed by Australia in 1906.[122] Several other nations followed in the years up to 1920, with the United States enacting its first antidumping law in 1916, and another in 1921.[123] In the interval between World War I and the 1950s, only a few more countries adopted antidumping laws, but they became increasingly popular thereafter,[124] increasing exponentially after the creation of GATT and the WTO.[125]

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[118] *See id.* at 52–59.

[119] *Id.* at 60.

[120] *Id.* at 67.

[121] *Id.* at 70.

[122] IAN WOOTON & MAURIZIO ZANARDI, *Antidumping versus Antitrust: Trade and Competition Policy*, in ANTIDUMPING LAW AND PRACTICE, A COMPARATIVE STUDY 385 (John H. Jackson & Edwin A. Vermulst eds., University of Michigan Press 1990).

[123] Antidumping Act of 1921, 19 U.S.C. §§ 160–73 (2000), *repealed by* Pub. L. No. 96-39, § 106(a), 93 Stat. 193 (1979).

[124] WOOTON & MAURIZIO ZANARDI, *supra* note 122, at 385.

[125] *See id.* at 386.

B. Development and Process of United States Antidumping Law

In the United States, the Sherman Antitrust Act was originally promulgated in 1890 to combat trusts and other anticompetitive behavior,[126] but the Supreme Court declared that its reach was limited to U.S. borders.[127] In this context, selling the same product at different prices in different regions of the United States due to differences in the cost of manufacturing, sale, or delivery is perfectly acceptable, unless its effect is to hinder or destroy competition, in which case it is price discrimination in violation of United States Antitrust laws.[128] Because the Sherman Act did not reach non-U.S. actions, antidumping laws in the U.S. were originally developed in the context of antitrust laws, in response to a perceived threat of dumping by post-World War I Europe.[129] The concern was that dumped European imports would harm American industries unable to marshal their resources and lower their prices without facing bankruptcy.[130] Thus, fearing overwhelming competition from post-World War I Europe, Congress passed the Antidumping Act of 1916, which subsequently became part of antitrust law.[131] The Antidumping Act provided a private right of action for relief from "any person importing . . . any articles . . . into the United States . . . at a price substantially less than the actual market value or wholesale price . . . at the time of exportation to the United States . . . ."[132] In other words, private parties could sue "dumpers" directly for damage done to their businesses, rather than going through an agency administration.

Under the 1916 Act, the plaintiff had to prove predatory intent in addition to dumping.[133] Because it proved to be nearly impossible for

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[126] 15 U.S.C. §§ 1–5 (2000).

[127] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) ("But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.").

[128] 15 U.S.C. § 13(a) (2000); *see also* VINER, supra note 110, at 3.

[129] VINER, *supra* note 110.

[130] *Id.*

[131] 15 U.S.C. § 72 (repealed 2004); Nicole DiSalvo, Note, *Let's Dump the 1916 Antidumping Act: Why the 1994 GATT Provides Better Price Protection for U.S. Industries*, 37 VAND. J. TRANSNAT'L L. 791, 798 (2004); *see also* Dianne M. Keppler, Note, *The* Geneva Steel Co. *Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act Violates the WTO Antidumping Agreement*, 32 GEO. WASH. INT'L L. & ECON. 293 (1999); Monica A. Stump, Note, *The Alarms Are Buzzing in Washington: The Antidumping Act of 1916 Returns from Hibernation*, 63 U. PITT. L. REV. 645 (2002).

[132] Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 221 F.3d 924, 925 n.1 (6th Cir. 2000) (citing former 15 U.S.C. § 72).

[133] 15 U.S.C. § 72 further required that "such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States." *See also* Stump *supra* note 131 at 654

plaintiffs to provide evidence of predatory intent, in 1921 Congress provided an alternative method, granting the executive branch statutory authority to investigate and assess additional tariffs for dumping.[134] Unlike the earlier act, the 1921 Act did not contain an intent requirement, making it easier for plaintiffs to obtain relief because they only had to prove dumping and injury.[135] Furthermore, the relief provided by the new antidumping act was in the form of duties imposed on the imported product rather than private damages as provided under the 1916 Act. As amended by the Trade Agreements Act of 1979[136] and the Uruguay Round Agreements Act, it is this framework that remains in effect. [137]

After being ruled a violation of the WTO Antidumping Agreement,[138] the 1916 Antidumping Act was repealed in 2004.[139] As indicated above, even before its repeal, it was rarely used. Thus, in accordance with WTO agreements, the 1921 Act, as recast in 1930 and revised in 1994, is now the sole remedy for dumping in the United States. It does not provide petitioners with any private remedy, but in accord with WTO strictures, allows the International Trade Commission of the U.S. Government to impose additional duties above and beyond the ones delineated in the WTO schedule.[140] These additional duties are collected and kept by the U.S. Treasury. The 2000 Byrd Amendment provided that the sums collected would be redistributed to petitioners to offset the costs incurred in pursuing the action. However, like the 1916 Act, the WTO found the Byrd amendment to be non-compliant, and it has subsequently been repealed.[141]

(discussing commentary disagreeing over whether or not the plaintiff must prove intent to decrease competition or create or a monopoly).

[134] Geneva Steel Co. v. Ranger Supply Corp, 980 F. Supp. 1209, 1215 (D. Utah 1997); Keppler, *supra* note 131, at 296.

[135] Christopher M. Barbuto, Note, *Toward Convergence of Antitrust and Trade Law: An International Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047, 2068 (1994).

[136] S. REP. NO. 96-249, at 16, *reprinted in* 1979 U.S. CODE CONG. AND ADM. NEWS, at 381; *see also* Trade Agreements Act of 1979, 19 U.S.C. § 2501 (1994).

[137] H.R. REP. NO. 103-826, pts. I & II, and Statement of Administrative Action, *reprinted in* 1994 U.S. CODE CONG. AND ADM. NEWS, at 3773; *see* 19 U.S.C. § 3501 (2000).

[138] Appellate Body Report, *United States—Antidumping Act of 1916*, WT/DS136, 162/AB/R (Mar. 31, 2000) (*adopted* Sept. 26, 2000).

[139] Act of Dec. 3, 2004, Pub. L. No. 108-429, tit. II, § 2006(a), repealed by 118 Stat. 2597.

[140] *See* 19 U.S.C. § 1673 (2007) (setting forth the requirements for an antidumping action). *See also* H.R. REP. NO. 103-826, *supra* note 137; 19 U.S.C. § 2502 (2007) (adopting the freer trade goals of the WTO: "The purposes of this Act are—(1) to approve and implement the trade agreements negotiated under the Trade Act of 1974 [19 U.S.C. § 2101]; (2) to foster the growth and maintenance of an open world trading system; (3) to expand opportunities for the commerce of the United States in international trade; and (4) to improve the rules of international trade and to provide for the enforcement of such rules, and for other purposes.").

[141] *See supra* note 95.

Under current U.S. antidumping law, one agency determines whether dumping has occurred, while another determines whether the U.S. industry has sustained a material injury (or threat thereof).[142] In keeping with the procedures delineated by the WTO Antidumping Agreement, an industry participant files an antidumping petition simultaneously with the U.S. Department of Commerce ("DOC") and the U.S. International Trade Commission ("ITC"). Within forty-five days of filing, the DOC must determine whether there is a "reasonable basis to believe or suspect" that dumping has occurred, and the ITC must determine if there is a "reasonable indication" of a material injury or threat thereof to the U.S. industry.[143] The purpose of these two preliminary investigations is to eliminate frivolous cases, spare foreign importers unsubstantiated harassment, and conserve the U.S. government's financial resources.[144]

If the preliminary determinations are negative, the case is terminated,[145] but if not, then as an interim measure, the foreign producer must post a bond or deposit money to cover any duties that may be imposed.[146] After a full investigation, if the DOC and ITC make a final determination that dumping has occurred and a U.S. industry was either materially injured or threatened with material injury, then an antidumping duty order is imposed on the foreign producer equal to the dumping margin.[147]

As previously indicated, as there is no intent requirement, the motive of the seller in dumping the product is inconsequential.[148] In fact, dumping is usually a result of oversupply and has nothing to do with predatory pricing. The enhanced duties are applied prospectively, and serve ostensibly to protect U.S. industry by forcing the foreign producer to 1) raise the selling price of the good in the United States to incorporate the heightened duty or 2) withdraw from the U.S. market to avoid payment of the new duties.[149] As the motive of the seller is inconsequential, one can no longer argue that dumping is generally the result of deliberate, predatory behavior on the part of another country, with the aim of destroying a domestic industry. The only concern is whether by trading at "less than

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[142] 19 U.S.C. § 1673 (2006) (The U.S. Department of Commerce is the administering authority that determines if dumping is present); 19 U.S.C. § 1673b (2006) (The International Trade Commission ("ITC") determines if there is material injury).

[143] 19 U.S.C. §§ 1673a–b (2006).

[144] Hale E. Sheppard, *The Continued Dumping and Subsidy Offset Act (Byrd Amendment): A Defeat Before the WTO May Constitute an Overall Victory for U.S. Trade*, 10 TUL. J. INT'L & COMP. L. 121, 123 (2002).

[145] 19 U.S.C. § 1673a(c)(3) (2006).

[146] 19 U.S.C. § 1673b(d) (2006).

[147] Sheppard, *supra* note 144, at 146.

[148] *Wheeling-Pittsburgh Steel Corp.*, 35 F. Supp. 2d at 601.

[149] *Id.*

normal value," the foreign importer is injuring the domestic industry, and the logical result is that prices for the affected products remain at the pre-existing U.S. level, rather than being challenged by the cheaper imports. Thus, antidumping duties serve to protect domestic competitors, not to protect competition. U.S. agency procedures for CVD actions parallel antidumping procedures, as would be expected.[150] Safeguards actions have more stringent requirements, and the ultimate decision of whether or not to impose a safeguard is left with the President, not a governmental agency.[151]

V. NUMERICAL ANALYSIS OF TRADE REMEDIES REPORTED TO THE WTO

A. WTO Annual Committee Reports

One of the best (and only) reliable source of statistics on the number of trade remedies are the annual reports issued by the pertinent WTO Committees: under each of the three Agreements, members are required to report the number of remedy measures initiated and put in place on a biannual basis.[152] Although the WTO admits that the reports are not always accurate,[153] to the extent that most member countries attempt to report accurately, the numbers are indicative of trends.

1. Safeguards Remedies

As shown in Graph 1 below, reporting of safeguard initiations started only in 1998, when nineteen initiations were reported worldwide. In 2006, that number had dropped to fourteen initiations, all by developed and developing countries, with none by least-developed countries. Interestingly, in 1998 the number of initiations in developed countries outnumbered those initiated in developing countries (11:8), but by 2006, those numbers were reversed (4:10). There was a worldwide spike in 2000, when forty-seven safeguard remedies were initiated.

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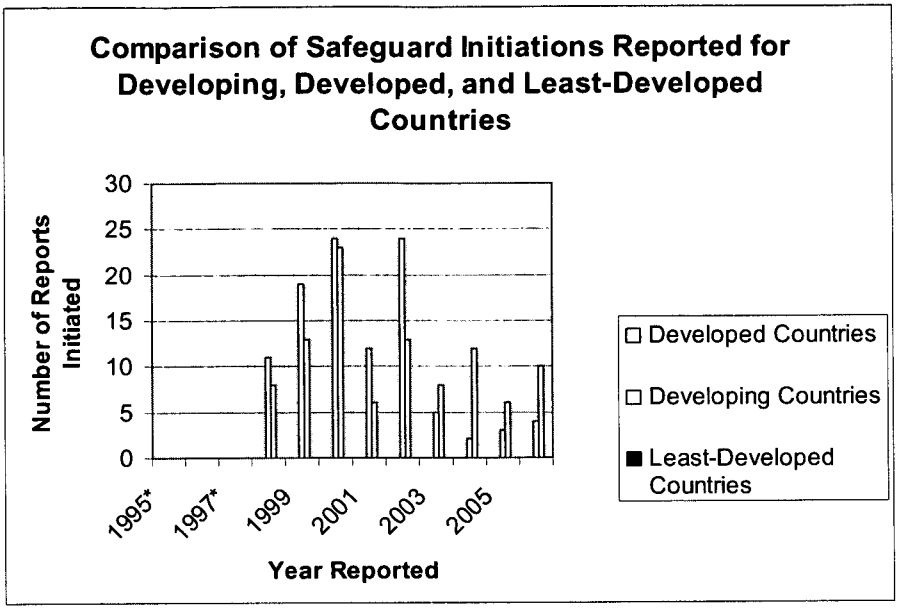
[150] *See* 19 U.S.C. § 1671 (2000); *see also* 19 C.F.R. § 351.101 (2000).

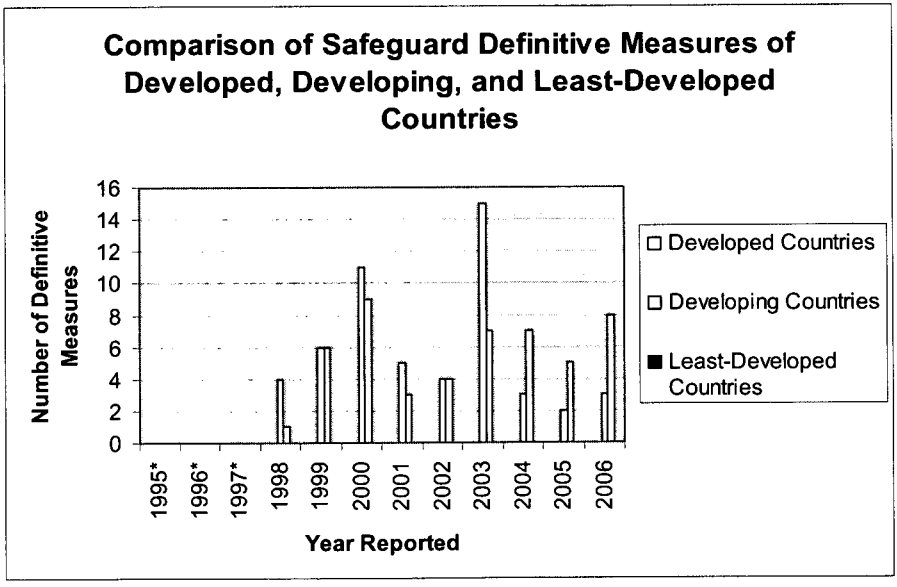
[151] Trade Act of 1974, 19 U.S.C. § 2251 (2000).

[152] CONG. BUDGET OFFICE, ANTIDUMPING ACTION IN THE UNITED STATES AND AROUND THE WORLD: AN UPDATE *vii* (June 2001), *available at* http://www.cbo.gov/ftpdoc.cfm?index=2895&type=0.

[153] *See, e.g.*, Antidumping Committee Report, *supra* note 42, at 2 (indicating that 70 members failed to submit semi-annual notifications).



Graph 1

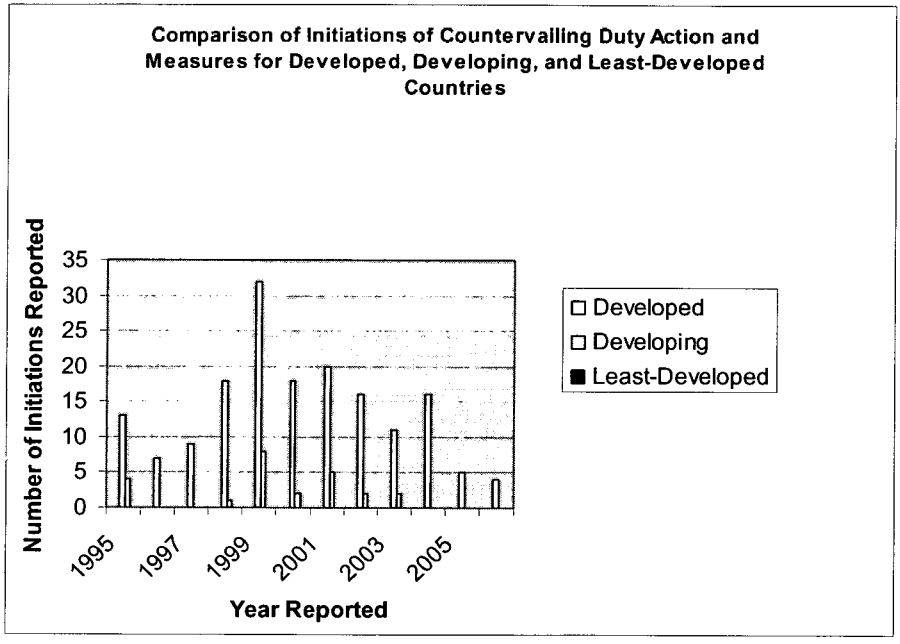


Graph 2

As shown in Graph 2 above, in terms of measures in place, there were

five measures worldwide (four in developed countries, one in a developing country) in 1998, as compared to eleven in 2006 (three in developed countries, eight in developing), with a similar spike of twenty in 2000. No matter which way it is measured, there is no significant increase over the eight-year period in the number of safeguard remedies either filed or in place. The number of safeguards actions remains extremely low as compared to anti-subsidies and antidumping actions, probably because safeguards actions require a higher level of proof, present more risks for the domestic government, and are less likely to be granted.[154] Nevertheless, there was a spike in the number of safeguard actions in 2000.

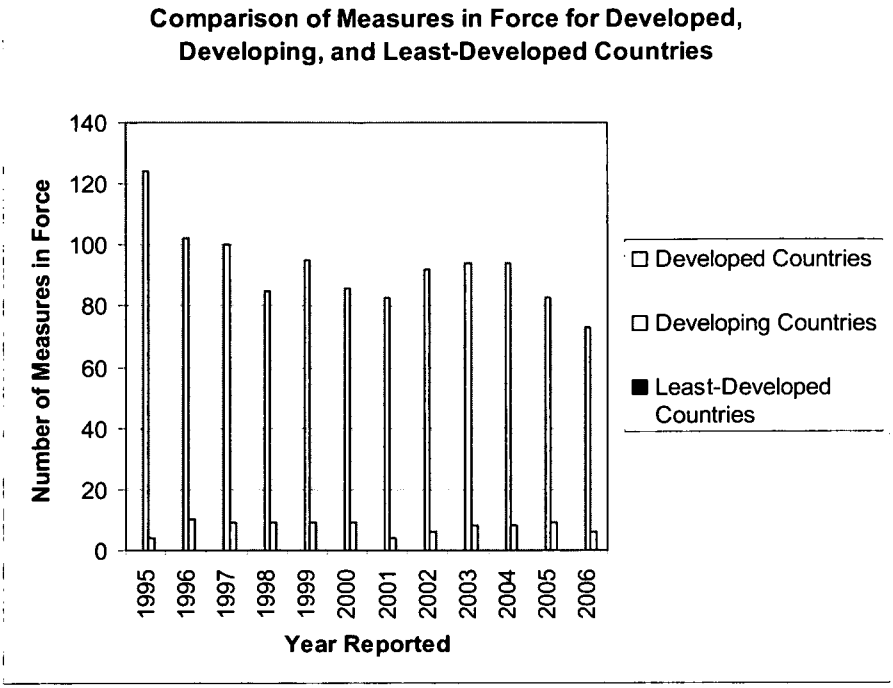
2. Countervailing Duties Remedies



Graph 3

As shown in Graph 3, there were a total of seventeen CVD initiations in 1998, thirteen in developed countries and four in developing countries. After a spike of twenty-five in 2001, by 2006, the number had dropped precipitously to a total of four filed in developed countries.

[154] *See infra* Part V.B. for additional discussion.



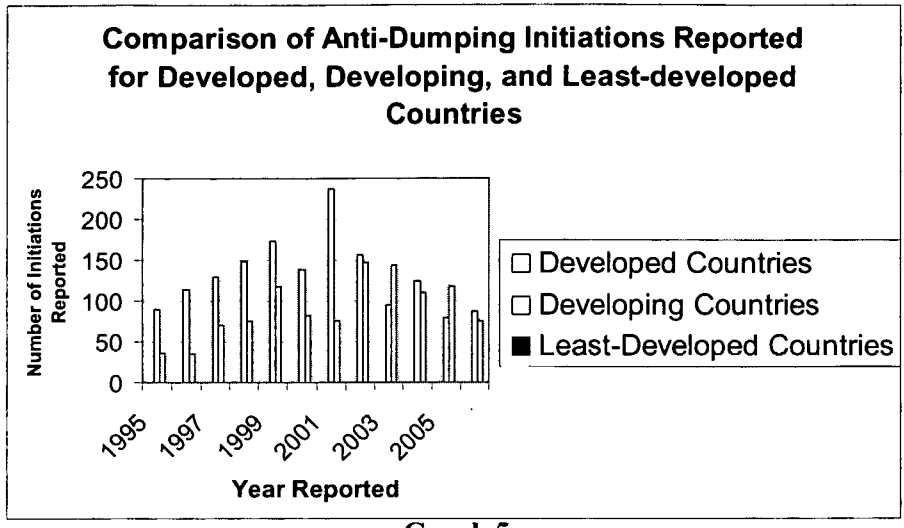
Graph 4

In terms of measures in force, Graph 4 shows that in 1995 there were a total of 128 (124 in developed countries, four in developing countries). The number dwindled thereafter, with 105 in 2000 and seventy-nine in 2006 (seventy-three in developed countries, six in developing countries).

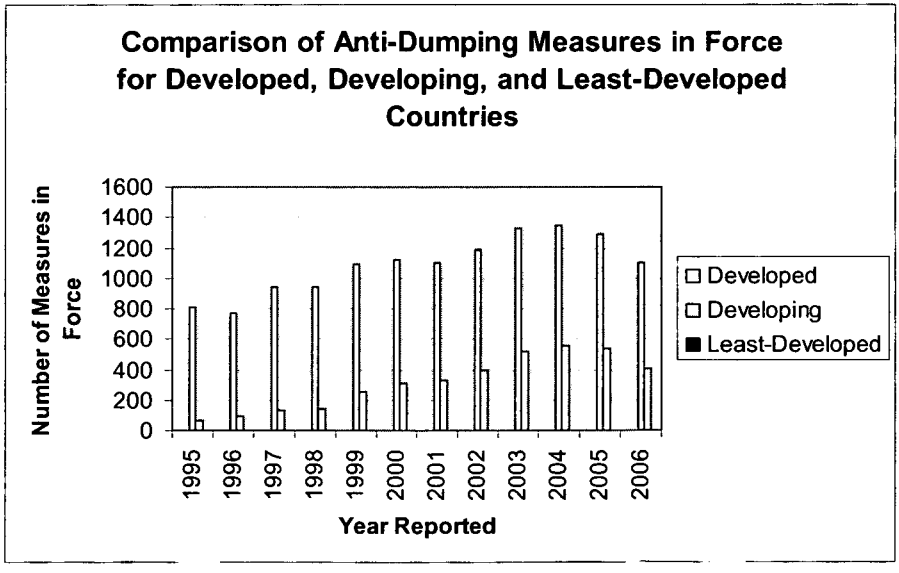
3. Antidumping Remedies

As predicted in 1997, antidumping measures have become the predominant form of trade remedy.[155] In 1995, Graph 5 shows a total of 126 initiations—ninety in developed countries, and thirty-six in developing countries. By 2006, developing countries were responsible for a much higher percentage of the initiations: out of a total of 163 initiations, seventy-six were in developing countries, and eighty-seven were in developed countries. As with safeguards initiations, there was a spike in 2001 of a total of 313 initiations.

[155] Corr, *supra* note 42, at 66–68.



Graph 5



Graph 6

Measures in force, as demonstrated in Graph 6, show a similar pattern of increasing numbers in developing countries. In 1995, out of a total of 873 measures, 805 were in developed countries and sixty-eight were in

developing countries. By 2006, the total number had grown to 1,402 measures, with 1,099 in developed countries and 404 in developing countries. Rather than a spike in 2001, the numbers increased beginning in 1999 to approximately 1,300 measures, continued to increase through 2004, and have decreased for the past two years.

B. Reasons for Disproportionate Number of Antidumping Measures

Safeguards are the least used remedy, for logical reasons. From a petitioner's perspective, although they involve a faster timeframe than antidumping or countervailing duty measures, they require a higher level of proof and provide only temporary relief in diminishing amounts.[156] Furthermore, because CVD actions generally result in significantly lower duties than antidumping investigations, they are less protective of domestic industries and therefore less attractive.[157] Furthermore, because they apply to all imports, they are more likely to be objected to by other countries, and therefore are riskier in the eyes of the domestic governmental agency.

In comparison to both anti-subsidy and safeguards proceedings, antidumping measures are much more attractive to potential petitioners. To begin with, because of the intricacy of the calculations involved, the calculation of normal value can be tilted towards a finding of dumping.[158] It is relatively easy to file a successful antidumping complaint targeting specific competitors, and a successful complaint is likely to lead to duties that have a direct and sustained price effect on specific merchandise.[159] Although WTO rules stipulate a sunset review after five years, in the United States the perception has been that it was unlikely that a sunset review would result in revocation of the original order.[160]

In fact, however, any such perception may be inaccurate because the first time the WTO-mandated U.S. sunset review procedures were utilized, in 2000, almost half of the antidumping measures reviewed were revoked: the Commerce Department revoked fifty-seven antidumping orders and continued seventy-two (thus revoking 57 out of 129 or 44% of the measures reviewed).[161] This was an unusually large number because it was the first

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[156] *Id.* at 72.

[157] *Id.* at 73.

[158] RICHARD WRIGHT, *Validity of Antidumping Remedies—Some Thoughts, in* ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 425, 451 (John H. Jackson & Edwin A. Vermulst eds., University of Michigan Press 1990).

[159] Corr, *supra* note 42, at 74.

[160] Cunningham, *supra* note 97, at 900.

[161] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2005 TRADE POLICY AND 2004 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 266 (2005), *available at* http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/Section_Index.html.

year the sunset review measure was utilized. Nevertheless, there still seems to be a good chance that a measure will be revoked at its sunset review.[162] Apparently, the chances of revocation are better if the respondent participates actively in the review. There is now some showing that import producers may choose to invest more in a sunset review than in the initial response, possibly as a consequence of these statistics.[163]

VI. CRITICISM LEVELED AT TRADE REMEDIES

The criticism of unfair trade actions is broad, and takes issue with calculation methodology, underlying policies, and consequent effects. Some critics argue that inaccuracies in the methodology make determinations of the margin of dumping inaccurate and unreliable.[164] Others argue that the proceedings are so expensive that the remedies are effectively unavailable in small developing countries or to small, emerging industries. Some claim that the United States and other developed countries are using antidumping measures too widely, or are targeting certain countries.[165] Still others argue that antidumping remedies have been used by U.S. entities to attack infant industries in least developed countries specifically developed with U.S. funds to import into U.S. markets, thus making the United States seem both hypocritical and protectionist.[166] A more fundamental line of criticism argues that unfair trade measures are by nature protectionist, ineffective, and undermine the concept of free trade and open markets.[167] For purposes of discussion, five categories of

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[162] *See id.* (reporting that in 2004, twelve out of twenty-nine orders reviewed were revoked).

[163] *See* TIMOTHY C. BRIGHTBILL, LINDA S. CHANG & PEGGY CLARKE, INTERNATIONAL PRACTIONER'S DESKBOOK SERIES: TRADE REMEDIES FOR GLOBAL COMPANIES 103 (ABA Publishing 2006) (discussing respondent companies' need to consider how to direct resources with regard to responding to both questionnaires and sunset reviews).

[164] *See, e.g.*, BRINK LINDSEY & DAN IKENSON, REFORMING THE ANTIDUMPING AGREEMENT: A ROAD MAP FOR WTO NEGOTIATIONS 14–20 (Cato Institute 2002) (listing criticisms of normal value calculations).

[165] *See, e.g.*, Lei Yu, *Rule of Law or Rule of Protectionism: Anti-dumping Practices Toward China and the WTO Dispute Settlement System*, 15 COLUM. J. ASIAN L. 293, 326–32, 339–40 (2002) (arguing that U.S. calculations of constructed normal value for Chinese imports is outdated and based on misinformation, and implying that large number of antidumping proceedings brought in the United States against China indicates a general discriminatory intent).

[166] *See, e.g.*, Kenneth Harrell, *Fables of Global Capitalism: Antidumping and Vietnamese Catfish*, 28 SETON HALL LEGIS. J. 439, 440 (2004) (pointing out that the U.S. antidumping action at issue was especially disturbing because the very government preventing the export of Vietnamese catfish initially encouraged its cultivation for export).

[167] *See, e.g.*, Ehrenhaft & Meriwether, *supra* note 36, at 1114–16 (1984) (arguing that antidumping laws have never significantly promoted their stated purposes, have not enhanced the health of the U.S. economy, and give the very industries most in need of modernization and adaptation a means of sheltering themselves from market forces); *see also*

criticism will be discussed: "unfair trade remedy" as a misnomer, inaccuracies in calculation of dumping and injury, high cost of trade remedy actions, trade remedies as contra to the free market, and trade remedies as encouraging cartelization.

A. "Unfair Trade Remedy" is a Misnomer: Predatory Intent is a Fiction

Antidumping laws were originally justified as a remedy to counter unfair trade in the form of predatory pricing: the foreign producer was allegedly intentionally underselling the local competition in order to force it out of business. However, predatory pricing has been widely recognized as a myth because the predator must sustain a significant loss for long enough time to force his competition out of business, and then must maintain a monopoly for a long enough time to be able to raise prices and regain its loss.[168] In fact, dumping is most commonly a result of oversupply, and rarely involves predation. It has little or nothing in common with unfair trade or antitrust law.

Though they are commonly referred to as remedies for unfair trade, "nowhere in the WTO Agreements is it explained that there is such a thing as 'unfair trade' or why 'unfair trade' should be disciplined as something inconsistent with our counterproductive to the WTO's basic formula of encouraging freer trade by substantially reducing tariffs and other barriers."[169] Unfair trade law (as opposed to trade remedies) began in the United States in 1890 with passage of the Sherman Antitrust Act[170] and the Federal Trade Commission Act ("FTC Act") in 1914.[171] The Sherman Antitrust Act was designed to outlaw collusive behavior, specifically to break up trusts and monopolies that avoid or distort market-place competition by setting industry prices. Such examples include the forced break-up of the Standard Oil Company of New Jersey[172] (a trust founded by John D. Rockefeller), as well as the break-up of AT&T.[173]

LINDSEY & IKENSON, *supra* note 164, at *viii* (arguing that the Antidumping Agreement allows wide scope for protectionist abuses, and acts as a major loophole in the free-trade disciplines of the world trading system).

[168] Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp, 475 U.S. 574, 587–90 (1986).

[169] *See* Cunningham & Cribb, *supra* note 100, at 155.

[170] Sherman Antitrust Act, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7 (1890).

[171] Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (current version at 15 U.S.C. § 45(a)(1)(2006)).

[172] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1910).

[173] United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, Maryland v. United States, 460 U.S. 1001, 1005–06 (1983) (approving dismissal pursuant to settlement between Department of Justice and AT&T). Through a settlement, Microsoft narrowly avoided such a break-up in the United States, United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001), *cert.denied*, 534 U.S. 952 (2001), though it faced a substantial penalty in Europe. Commission Decision of 24 Mar. 2004 (Case COMP/C-3/37.792

Additionally, the FTC Act, like the Sherman Antitrust Act, is focused on perceived evils in the marketplace by declaring unlawful: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[174] The FTC Act's legislative history indicates that "unfair methods of competition" was intended to prohibit practices regarded as against public morals but not previously recognized as unlawful, as well as those already unlawful under common law or equity.[175] Conduct prohibited as "unfair" under the FTC Act includes behavior such as concealing a business relationship with a purported competitor,[176] using misleading labels on goods,[177] instigating misleading media reports or vexatious litigation against a competitor,[178] using bribes or other financial inducements to persuade a distributor to discontinue carrying competing products,[179] or using espionage techniques to obtain the names of a competitor's customers.[180] Thus, "unfair" under the FTC Act does not simply mean selling at a lower price. In fact, the whole point of protecting competition is to encourage lower prices and better products for consumers.

Over its history, the interpretation of the FTC Act has varied: first, it broadened out of concern for the consumer protection policies of the 1960s.[181] Then, like the antitrust legislation, it narrowed in the 1980s out of

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Microsoft), *available at* http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf.

[174] 15 U.S.C. § 45(a)(1) (2006). *See also* David L. Belt, *The Standard for Determining "Unfair Acts of Practices" Under State Unfair Trade Practices Acts*, 80 CONN. B.J. 247, 249-54 (2006) (discussing the history of how the FTC Act has been interpreted).

[175] 51 CONG. REC. 11112 (daily ed. June 25, 1914) (statement of Sen. Francis Newlands); 51 CONG. REC. 12981 (daily ed. July 30, 1914) (statement of Sen. George Sutherland).

[176] *See* FTC v. St Louis Lightning Rod Co., 3 F.T.C. 327, 336 (1921); FTC v. A.A. Berry Seed Co., 2 F.T.C. 427, 440 (1920); FTC v. Armour & Co., 1 F.T.C. 430, 435 (1919).

[177] FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922).

[178] Chamber of Commerce of Minneapolis v. FTC, 13 F.2d 673, 682 (8th Cir. 1926).

[179] Hastings Mfg. Co. v. FTC, 153 F.2d 253 (6th Cir. 1946).

[180] The FTC's interpretation of its "unfair trade" mandate broadened in 1964 with the Commission's statement of the "Cigarette Rule Standard." FTC v. Oakes Co., 3 F.T.C. 36, 41 (1920).

[181] "No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts of practices, but the examples should help to indicate the breadth and flexibility of the concept of unfair acts and practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8325,

free market concerns.[182] As opposed to the consumer protection concerns of the 1960s, U.S. government policy in the 1980s demonstrated a stronger regard for the marketplace as self-correcting, and a stronger reliance on consumers' wisdom in choosing desirable alternatives and avoiding those that are undesirable.[183] Today, FTC regulation of unfair trade remains comparatively narrow and market-friendly. Consequently, firms often price their products differently in different markets and sell below cost (respectively referred to as "price discrimination" and "predatory pricing" in antitrust terms). However, these practices generally do not run afoul of FTC or antitrust laws. In fact, non-predatory price discrimination and sales below cost are relatively common.[184]

> Firms commonly sell products at prices below their full costs of production. For example, many firms lose money during recessions, which means by definition that they are selling at prices that are below their costs. The introduction of a new product may also lead to below-cost sale. Many new products lose money for a period until demand reaches amounts that can be produced efficiently and the producing firm learn through experience the most efficient way to produce those products. A further example is the use of so-called loss leaders in retail sales. Loss leaders are products that a store puts on sale at very low prices to attract customers into the store, with the hope that customers will see and purchase other, higher-priced products.[185]

While some may question the justifiability of antitrust law,[186] in both antitrust and unfair trade law, the focus is on preserving competition in a free marketplace, rather than protecting competitors. In contrast, the focus in trade remedy law is on protecting domestic competitors.

Antidumping petitioners are in reality complaining not about any predatory intent or unfairness, but about the fact that the foreign competitor is under-pricing them. Thus, they are asking to be protected from competition. Countervailing duty petitioners have a stronger argument: they are arguing that the foreign competitor's low price distorts the market

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8355 (July 2, 1964) (to be codified at 16 C.F.R. 408). The FTC's rule concerning cigarette advertising, codified at 16 C.F.R. 408, was preempted by Congress's Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 5(a), 79 Stat. 283 (1965), which prohibited the FTC from further regulating cigarette labeling.

[182] *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1984) (Congress narrowed the scope).

[183] *See* Belt, *supra* note 174, at 264–67.

[184] *See* CONG. BUDGET OFFICE, *supra* note 152, at 3.

[185] *Id.* at n.10.

[186] *See, e.g.*, Block & Gries, *supra* note 35.

because it is the result of a governmental subsidy.[187] Safeguards petitioners acknowledge that they simply cannot compete against any foreign competitors, and are asking for relief. Thus, all trade remedies are aimed at protecting domestic competitors, not competition—a result diametrically opposed to both the WTO's freer trade policy and U.S. antitrust policy.

Because unfair trade remedies do not have the strong moral component of some laws—they are not intended to right any wrongful act—and because they are inconsistent with the GATT/WTO principle of freer trade, some have suggested that unfair trade remedies be replaced by an international antitrust law.[188] However, this does not address the political and practical pressures that can force a country to adopt an unfair trade measure in the first place. A developing country may want to protect an infant industry that employs a significant number of its citizens, so that it can become competitive.[189] And in a developed country such as the United States, a government may face tremendous political pressure from major industry players.[190] In either case, a government may be called upon by its citizens to protect its borders—and it can be argued that a government's primary duty is to protect its borders (though admittedly from invading marauders, not marauding imports). The issue then becomes whether the protection provided under the WTO exceptions is intellectually viable or worthwhile. A number of critics say no on both accounts.

B. Inaccurate and Grotesquely Complicated Methodology in Dumping and Injury Calculations

In addition to criticizing trade remedies (particularly antidumping) as based on a fictional wrong, critics have taken issue with the methodology of calculating dumping margins and injuries. The critics argue that it is highly inaccurate and lends itself to manipulation.[191] The WTO rules require that the determination of dumping and injury be made on a sound factual basis,

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[187] *See* discussion *infra* Part VII.C.

[188] *See, e.g.*, Ehrenhaft & Meriwether, *supra* note 36, at 1151; *see also* Eleanor M. Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 TUL. L. REV. 571 (2005) (advocating the use of restraint by national authorities with overlapping jurisdiction in antitrust cases involving multinational companies).

[189] *See infra* text accompanying notes 245–47.

[190] *See* Ehrenhaft & Meriwether, *supra* note 36, at 1115 ("This article contends that there is no convincing evidence that the laws, even when properly used, do any measurable good . . . . Their history reflects a consistent congressional effort, at the constant urging of certain powerful sectors of U.S. industry and labor, to protect U.S. industries against import competition.").

[191] *See, e.g.*, LINDSEY & IKENSON, *supra* note 164; Cunningham, *supra* note 97, at 898 (indicating that the Department of Commerce has adopted a number of interpretations tending to increase the dumping margin).

but getting accurate numbers is difficult, and the process is necessarily complex. Assume that the applicant is a U.S. company. The applicant company submits its own numbers and must see that enough of his U.S. competitors do so as well to reach the requisite 25% of U.S. production. The company also, however, must present numbers for the importer and for the importing country's industry. Those extra-territorial numbers are collected by the economists the company hires to study the industry in the importing country, about which information may be scarce or unreliable.

The applicant's government then sends questionnaires to the importers identified in the petition, and asks them directly for their numbers. If the importers choose not to reply, then the applicant's government may use the self-serving "best available" numbers submitted by the applicant. If the companies choose to reply, then they have to provide accounting of a sort that they would never do for normal business purposes, based on direct expenses applied precisely on a sale-by-sale or customer-by-customer basis.[192] This involves a painstaking recalculation of product costs.[193] The more applicants and respondents there are, the greater the chance that one or more will submit inaccurate numbers. Assume, for the sake of argument, a 2% inaccuracy in each of five separate submissions from applicants and respondents—that amounts to a 10% inaccuracy overall. A 2% dumping margin is considered *de minimus*, therefore, any inaccuracy in the initial numbers submitted will be magnified in the resulting calculation. This potential inaccuracy occurs even before calculating in any changes in exchange rates that took place during the period in question, which further complicates matters and increases the likelihood of error. Furthermore, national authorities have substantial discretion to adjust an exporter's reported full costs, particularly where the exporter has departed from its normal accounting system.[194] This further calls into question the accuracy and comparability of the data used to make the myriad calculations required in a trade remedy case.

1. Dumping Calculations

The process of determining whether a product has been dumped has been termed "grotesque[ly]" complicated.[195] The first concern in a dumping calculation is determining the like product, and even if the product sold in the home market shows some similarities with the exported product, the exercise often becomes one of comparing apples and oranges. As one critic describes:

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[192] Corr, *supra* note 42, at 80.
[193] *Id.* at 81.
[194] *Id.* at 82.
[195] Ehrenhart & Meriwether, *supra* note 36, at 1131.

> In the typical antidumping investigation, the DOC compares home-market and U.S. prices of physically different goods, in different kinds of packaging, sold at different times, in different and fluctuating currencies, to different customers at different levels of trade, in different quantities, with different freight and other movement costs, different credit terms, and other differences in directly associated selling expenses (e.g., commissions, warranties, royalties, and advertising). Is it any wonder that the prices aren't identical?[196]

Even accepting that apples-to-oranges comparisons are inherently invalid, several estimations made in the calculation of normal value and the dumping margin further increase the likelihood of inaccurate results. The United States defines dumping as the sale of a commodity in an export market at a price less than "normal value."[197] Similarly, the WTO defines it as either "international price discrimination," or "export pricing at levels below the cost of production plus a reasonable amount for selling, general and administrative expenses, and profit." (i.e. "normal value").[198] Under either terminology, dumping occurs when the product as exported is sold at a price lower than the one for which it is normally sold at home: the price per unit in the exporter's home market ("foreign market price") minus the export price per unit. The extent of dumping ("dumping margin") is then calculated by dividing the difference by the export price. Thus, if a foreign producer sells widgets for $10 at home and for $8 in the United States, then its dumping margin is 25%.[199]

Even if a product is sold in the home market, it can be difficult to determine its price. There may be (and usually are) several prices used in both markets, so usually a weighted average price of home market sales is compared to either a weighted average of the export sales or to export sales on a transaction-by-transaction basis.[200] The highest home market price is excluded from the U.S. calculation (thus making it less likely that the exported price is lower than the adjusted home price, making a dumping finding less likely), but even so, getting accurate numbers concerning the sales and prices of a product in another country is problematic, and that is assuming that a like product is sold to a like market at a like period of time in the home country. Furthermore, the United States has practiced

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[196] LINDSEY & IKENSON, *supra* note 164, at 21.

[197] 19 U.S.C. § 1673 (2006).

[198] Communication from the United States to the WTO Negotiating Group on Rules, *Basic Concepts and Principles of the Trade Remedy Rules*, TN/RL/W/27 (Oct. 22, 2002), *available at* http://geneva.usmission.gov/press2002/1017%20basicconcepts.html.

[199] LINDSEY & IKENSON, *supra* note 164, at 1.

[200] Antidumping Agreement, *supra* note 32, art 2.1; *see also* Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT'L. & COMP. L. 99, 116–17 (2005) (discussing zeroing).

"zeroing" in deciding which of a number of prices to use in calculating an average price.[201] In other words, it has ignored instances of negative dumping margins where the U.S. price is higher than the home-market price, thus skewing the calculation back in favor of finding dumping.[202]

Even assuming an accurate average home market price, dumping calculations can be inaccurate, showing dumping where there is none. Assume that the per capita income in the home country is significantly lower than that in the importing country. Thus, even if the same product, say a Hi-Def TV set, is sold for the same price (but for reasonable expenses), that price will be prohibitively expensive at home but attractive overseas. In such cases, the manufacturer will be motivated to lower the home price as much as possible, counting on making up the difference through a higher export price—the opposite of dumping.

If, however, the local economy takes a downturn and the manufacturer finds that the home market has dried up but the manufacturer has a substantial amount of product on hand, it may leave the home price as is and lower the manufacturer's export price as much as possible until the surplus is sold. In such a case, the result would be that the home price is higher than the export price, and thus the product is "dumped," even though the total profit the manufacturer receives is the same or less than he would have received had his home market been healthy. The "normal value" on which the dumping margin is calculated is not normal for the home market.

Very often, however, there are little or no sales of like product in the home market, in which case, the export price—the second definition—must be used. Normal value is then calculated by subtracting certain costs from the export price in a third country. Similarly, a surrogate country is also used in calculation of normal value when the imported product is from a non-market economy.[203] The choice of a third country is quite problematic.

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[201] The WTO has found that zeroing in transaction-to-transaction calculations is not in compliance with the strictures of the Antidumping Agreement. *See* Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 31, 2004). Nor is it in compliance in average-to-average calculations, Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001), and in sunset reviews, Appellate Body Report, *United States—Sunset Review of AD Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶¶ 135, 162, WT/DS244/AB/R (Jan. 9, 2004).

[202] LINDSEY & IKENSON, *supra* note 164, at 70.

[203] In such a case, because market forces are not considered to be functioning properly in non-market economies, the DOC determines normal value by analyzing data from a surrogate country that (1) produces a significant amount of similar merchandise, and (2) is at a comparable level of economic development. Tariff Act of 1930, 19 U.S.C. § 1677b(c)(2) (1994). The DOC recognizes that China has "pockets" of competition, but presumes that any particular Chinese product is one from a non-market economy unless the respondents prove otherwise. The use of the analog price based on data from a surrogate is highly

The United States generally requires that the third country must be similar in size and population to the home country.[204] The argument then becomes that if the price at which the product is sold in the plaintiff importing country is less than that at which the product is sold in the third country, then there is "international price discrimination," or dumping. The same inaccuracies that apply to home market costs apply with regard to export price costs, though amplified, because the vagaries of assuming that market conditions in a third country are similar to those in the importing country. Furthermore, for example, there is nothing inherently unfair about selling widgets produced in China at a lower price in the United States than in Japan. Thus, the ironic result is that a U.S. manufacturer can lawfully practice price discrimination (selling the same product at different prices in different markets), but a non-U.S. company doing the same thing on an international level can be subjected to a dumping penalty.[205]

Finally, if there is neither a home price nor an export price, or if the export price is unreliable, then a constructive export price may be used.[206] In these cases, instead of the foreign market price, a constructive normal value is used: either the "cost of production plus a reasonable amount . . . ," or a comparable price as exported to an appropriate third country.[207] Logically, using a home market price is a more accurate determination of the existence of dumping than is a constructive export price, and a constructive export price, at best, can only be an estimate of whether or not the product is being dumped. The constructive export price is even further from reality than either the normal value or the export price in a third country. One would assume that export price and constructive export price are rarely used due to their inherent inaccuracies, but this is not the case. In one study of 141 U.S. antidumping proceedings, strict comparisons of U.S. and home-market prices were used in only four determinations—thus using a strict country-to-country comparison is the exception, not the rule.[208]

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controversial, especially as China is often the target of antidumping actions. Lei Yu, *Rule of Law or Rule of Protectionism: Antidumping Practices Toward China and the WTO Dispute Settlement System*, 15 COLUM. J. ASIAN L. 295, 310 (2002); *see also* Patricia H. Piskorski, *A Dangerous Discretionary "Duty": U.S. Antidumping Policy Toward China,* 34 HOFSTRA L. REV. 595 (2005) (discussing problems of non-market economy calculations with regard to China).

[204] *See* U.S. Department of Commerce, Antidumping/Countervailing Duty Petition Counseling and Analysis Unit, Glossary, http://www.ia.ita.doc.gov/pcp/pcp-glossary.html (last visited Mar. 8, 2008) (defining "Comparison Market" and "Constructed Export Price Offset").

[205] *See supra* note 94 and accompanying text.

[206] Antidumping Agreement, *supra* note 32, art. 2.5.

[207] *See id.* art. 2.2. Rules for calculating administrative, selling, and general costs and profits are given in arts. 2.2.1.1 and 2.2.2.

[208] LINDSEY & IKENSON, *supra* note 164, at 25.

2. Injury Calculations

In addition to showing that dumping exists, the governmental agency must determine that the domestic industry is materially injured or threatened with material injury, and must prove a causal connection between the dumping and that injury before antidumping duties may be imposed. However, critics argue that there are no clear standards for judging whether there is a causal link between the two: "Any coincidence of significant or rising imports and poor industry performance can serve as the basis for imposing antidumping remedies."[209] In the United States, the European Union, and India, the usual approach is a bifurcated analysis.[210] The governmental agency first determines whether a domestic industry is injured and next determines whether the subject imports constitute "a cause" of that injury. The argument against this approach is that there is no standardized, articulated method of linking the loss suffered by the affected industry to the imported product, and not some other cause: assuming the domestic industry is doing poorly, import volumes are up and prices down, then it is always possible for the agency to find that the imports made at least some contribution and thus make an affirmative determination.[211] In addition to establishing causation only through a weak association, this approach has been found by the WTO Appellate Body to violate the Antidumping Agreement which requires a closer link between dumping and a determination of injury, especially as it specifies that all other factors contributing to the injury be identified.[212]

C. High Cost of Unfair Trade Actions

Acting as a petitioner in an antidumping, countervailing duty, or safeguards case is expensive[213]: costs of a modest case exceed a million dollars in the United States.[214] Merely preparing the petition and supporting documents in an antidumping, CVD, or safeguard case is inordinately

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[209] *Id.* at 178.

[210] Prakash Narayanan, *Injury Investigations in "Material Retardation" Antidumping Cases*, 25 NW. J. INT'L L. & BUS., 37, 51–53 (2004).

[211] *See, e.g.*, Ronald A. Cass, *International Trade and Unfair Imports: Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 U. CIN. L. REV. 877 (1993); Alan O. Sykes, *The Economics of 'Injury' in Antidumping and Countervailing Duty Cases*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW 83 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

[212] Appellate Body Report, *United States—Anti-Dumping Act of 1916*, WT/DS162/AB/R (Sept. 26, 2000) (complaint by Japan); *see also* Antidumping Agreement, *supra* note 32, art. 3.5; Richard D. Boltuck & Seth Kaplan, *Conflicting Entitlements: Can Antidumping and Antitrust Regulation Be Reconciled?*, 61 U. CIN. L. REV. 903, 906–07 (1993).

[213] *See* Sheppard, *supra* note 44, at 121; Ehrenhaft & Meriwether, *supra* note 36, at 1136.

[214] INTERNATIONAL PRACTITIONER'S DESKTOP SERIES: TRADE REMEDIES FOR GLOBAL COMPANIES 19 (Timothy Brightbill, Linda Chang & Peggy Clarke eds., 2007).

expensive, in part because they are lengthy and must be submitted in multiple copies. In addition to legal costs of final preparation, filing, and advocacy, the collection and analysis of the factual information required for two industries (domestic and foreign), as well as the calculation of dumping margin and material injury requires hefty payments to accountants, policy analysts, industry experts, and economic advisors.[215] And this doesn't even include the in-house accounting costs. Consequently, as the price of such participation continues to increase, small and incipient industries in the United States are unable to gather sufficient resources to defend their market share, a result which some find reflects "poorly on the laws involved."[216] Governments of least developed countries may not even have the resources to implement unfair trade laws, let alone the resources needed to pursue such actions.

Unfair trade actions are costly not just for the petitioner, but also for the other parties involved: the respondent foreign competitors, the petitioner's government, as well as the applicants. Merely responding to the questionnaire sent by the petitioner's government's agency (which average more than seventy pages long)[217] requires substantial legal, economist, and accounting fees. Defending against the application is even more costly, as it is in a jurisdiction foreign to the defendant, so attorneys who are experts in this field must be hired in the foreign jurisdiction. If a respondent competitor chooses not to respond, then the agency is likely to impose duties based on the best available information (i.e., the self-serving numbers supplied by the petitioner).[218] Tactically, then, a respondent industry can decide whether the foreign market is worth the expense of the defense, how much of a defense it is feasible to bring (merely responding to the questionnaire or fighting the additional duty through to the WTO), or whether it will instead withdraw and wait for the sunset review to fight the measure—or it could file a retaliatory petition at home.[219]

The process is also expensive for the applicant's government, which must have a sophisticated apparatus in place in order to investigate the application and the responses, and to impose and collect the additional duties: its own attorneys, accountants, and economists. Thus, unfair trade actions are a rich man's game for large industries with significant market share as well as for developed and strong developing countries.[220] Least

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[215] *Id.* at 130.

[216] Paul C. Rosenthal & Robert T.C. Bermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round?*, 31 L. & POL'Y IN INT'L BUS. 871, 886–87 (2000).

[217] Piskorski, *supra* note 203, at 610.

[218] *Id.*

[219] *See generally* Bown, *supra* note 109.

[220] *See* N. Gregory Mankiw & Phillip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, FOREIGN POLICY, Dec. 2005 (describing antidumping applicants as "favored

developed countries, like Haiti, may be WTO members, but are likely to lack both the laws enabling unfair trade remedies and any agencies equipped to investigate and enforce those laws.[221]

While some may argue that the high cost of bringing an antidumping suit or defending one is a problem because it prevents small industries from bringing a claim, this may not be the strongest argument against such claims—all it means is that smaller industries are unlikely to use this mechanism to hobble competition, and will need to develop some other strategy for competing (such as developing better, less expensive products). In the case of larger industries, deciding whether or not to participate in an antidumping or other trade remedy proceeding is a business decision, in which the industry participants will weigh the potential cost against the potential gain.

The real cost concern is the long-term cost of such remedies to consumers, and whether or not trade remedies pose a severe long-term threat to the growth of local and global economies. As one prominent economist describes it:

> [T]he impact of antidumping tariffs falls most harshly on two groups whose interests members of Congress should be working to protect: the least well-off of their constituents and the vast majority of American producers. All Americans pay higher prices for food and housing, as a result of antidumping tariffs, but the burden is likely greatest on the poor, because these necessities make up a larger share of their spending. U.S. producers are affected because most items hit with antidumping tariffs are not finished goods, but components that are used to make other items.[222]

In 2001, the Congressional Budget Office reported that although U.S. trade policy is generally favorable to free trade, the antidumping duties imposed by the United States (one of the world's most aggressive users of antidumping laws) are a substantial impediment to trade, and impose net costs on U.S. economy as a whole.[223] Nevertheless, the study admitted that U.S. use of such measures had decreased since the WTO agreement went

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industries that have powerful lobbies"), *available at* http://www.foreignaffairs.org/20051201faessay84708/n-gregory-mankiw-phillip-l-swagel/antidumping-the-third-rail-of-trade-policy.html.

[221] The following WTO member countries are indicated as lacking such apparatus in 2006: Baharain, Benin, Botswana, Brunei Darussalam, Burkina Fraso, Burundi, Chad, Côte d'Ivoire, Macedonia, Ghana, Guinea, Haiti, Liechtenstein, Madagascar, Maldives, Mali, Myanmar, Namibia, Oman, Papua New Guinea, Qatar, Sri Lanka, Suriname, Swaziland, Switzerland, United Arab Emirates. ANTI-DUMPING COMMITTEE REPORT, *supra* note 40, at Annex A.

[222] Mankiw & Swagel, *supra* note 220.

[223] CONG. BUDGET OFFICE, *supra* note 152, at *xi*.

into place in 1995 and it was no longer the most aggressive Member in the WTO,[224] the average U.S. duty rate decreased,[225] and mandatory sunset review meant that U.S. duties were no longer in place "long enough to be effectively permanent for all practical purposes (though admittedly they were still in place longer than the five years anticipated in the Antidumping Agreement)."[226]

While research failed to show a more updated analysis than the 2001 study, an examination of U.S. use of antidumping measures shows that the United States is no longer even near the top of aggressors in initiating new applications. The most aggressive initiators of applications in 2006 were the European Union (twenty-five applications), followed by Argentina (twenty applications), China (sixteen applications), Australia (fourteen applications), India (eleven applications), Panama (nine applications), and Turkey (nine applications).[227] In comparison, there were only eight initiations in the United States[228] Nevertheless, in 2006, the United States had more antidumping measures in place than any other Member (262 measures, down from 336 in 1999), indicating that measures are still not timed-out as quickly as they possibly could or should be.[229]

Regardless of whether or not the numbers of antidumping measures and initiations are decreasing or increasing, the Congressional Budget Office study argues that antidumping measures are a drag on a country's economy. Even if other countries do not retaliate with high tariff measures of their own, the antidumping measures mean that other countries are less eager to purchase the aggressor's exports by an amount roughly the same as the reduction in imports. Ultimately, the import restrictions "serve only to keep employees (as well as capital assets, land, and any other factors of production that are not specific to the industry) from being forced by the market to shift from the protected industry to other, more productive economic sectors."[230]

There have been studies of the cost of antidumping duties on the U.S. economy. One study of duties levied between 1987 and 1992 estimated that thirty such duties reduced U.S. economic welfare by $275 million annually and cost U.S. consumers between $500 million and $800 million each year.[231] A 1999 study, which focused on the dynamics of foreign product

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[224] *Id.* at *xv*.

[225] *See id.* at *xvii*.

[226] *See id.*

[227] ANTI-DUMPING COMMITTEE REPORT, *supra* note 40, at Annex C.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 4.

[231] *See* James M. DeVault, *The Welfare Effects of U.S. Antidumping Duties*, 7 OPEN ECON. REV. 19 (1996).

pricing when faced with dumping duties, estimated the welfare loss to the U.S. economy to be in the range of $2 billion to $4 billion annually.[232] Extrapolation of this number to determine the welfare loss to the global economy caused by antidumping duties is beyond the scope of this study; however, it may be that the loss, even as large as it may be, is offset by the increase in global freer trade brought about by the WTO and the Uruguay Accord—the $10 trillion increase in trade. While the author of this article is but a lowly lawyer unskilled in higher economics, as an estimate, if the U.S. loss is between $2 and $4 billion annually, and the United States is responsible for approximately one-fifth of the antidumping measures in place (262 out of 1099 in 2006), then the average cost to the global economy is between $10 and $20 billion annually. As compared to the $10 trillion increase in global trade, this cost may be affordable. The concern, however, is that the cost is borne by those least able to afford it—consumers. Therefore, the logical implication is that implementation measures should minimize the availability of antidumping measures even if abandonment is impracticable.

D. Trade Remedies as Contra to the Free Market

Many economists traditionally argue that antidumping is unjustifiable for two reasons: it ignores and even hinders any global movement towards free trade and it often has a negative impact on competition in domestic markets.[233] The classical economist argues that antidumping and other trade remedies are dead-weight losses and interfere with efficient market flow. A deadweight loss is the reduction in consumer surplus from the under-consumption of the good plus over-production of the good due to the higher price that results from a protectionist measure.[234] When an antidumping, countervailing, or safeguards tariff is imposed, the price for a good produced abroad and sold domestically is raised, making consumers in the home country worse off.[235] So, for example, as one critic phrased it, assume the United States places a $30 tariff on a pair of Indonesian dress shoes. Thus, a pair of dress shoes that could be obtained for $50 in Indonesia, would sell for $80 plus taxes in the United States.[236] The $30 tariff makes the purchase of the shoes in the United States pointless,

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[232] Michael P. Gallaway, Bruce A. Blonigen & John E. Flynn, *Welfare Costs of U.S. Antidumping and Countervailing Duty Laws*, 49 J. INT'L ECON. 201 (1999).

[233] Gunnar Niels & Adriaan ten Kate, *Trusting Antitrust to Dump Antidumping: Abolishing Antidumping in Free Trade Agreements Without Replacing It with Competition Law*, 31 J. WORLD TRADE 29 (1997).

[234] Emile Dreuil, James Anderson, Walter Block & Michael Saliba, *Trade Gap: The Fallacy of Anti World-Trade Sentiment*, 45 J. BUS. ETHICS 269 (2003).

[235] *Id.* at 270.

[236] *Id.*

"though domestic sellers are made better off, consumers are made worse off."[237] The tariffs, therefore, result in an involuntary redistribution of well-being from consumers to sellers. Because there are typically far fewer sellers of a good than buyers, significantly more people are made worse off by such tariffs. Domestic consumers will buy fewer shoes, while domestic sellers will be encouraged to over-produce due to the higher prices brought by tariffs, resulting in a net loss in well-being to the entire society.

E. Trade Remedies as Encouraging National and International Cartelization

In addition to finding that the WTO unfair trade mechanisms are problematic in application and expensive to consumers, policy critics argue that they are anti-competitive in effect because they encourage cartelization on both a national and an international scale.[238] Critics assert that while these forms of protection have been imposed under the label of promoting "fair trade," they can easily be used by cartel-like industrial groupings in one country as a way of preventing foreign competition. In other words, in mandating that 25% of the home industry participate in the petition, unfair trade actions encourage price-setting that is backed by the home government when the petition proves to be successful.[239] Thus, "antidumping law facilitates the formation, maintenance, and enforcement of cartels."[240]

Furthermore, antidumping measures lend themselves to manipulation by cartels. One critic indicated that such cartelization is not mere theory by using the U.S. ferrosilicon industry as an illustrative example.[241] Apparently, in 1989, the three largest U.S. producers of ferrosilicon began meeting to increase their market share and prices in the United States and Europe by eliminating competition from producers in Asia and South

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[237] *Id.*

[238] Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 725 (2000).

[239] Michael Y. Chung, *U.S. Antidumping Law: A Look at the New Legislation*, 20 N.C. J. INT'L L. & COM. REG., 495, 522 (1995) (citing Antidumping Agreement, *supra* note 32, art. 5, para. 5.4.).

[240] Pierce, *supra* note 238, at 726; *but see* James C. Hartigan, *An Antidumping Law Can be Procompetitive*, 5 PAC. ECON. REVIEW 1 (2000) (arguing that a cartel is unlikely because participants' long term best interest is in breaking ranks with any such cartel, and that while antidumping laws affect both domestic and foreign firms' strategic behavior, the impact on these firms is ambiguous, and suggesting that a weak injury standard should be used in order to encourage firms to break ranks); Christopher T. Taylor, *The Economic Effects of Withdrawn Antidumping Investigations: Is There Evidence of Collusive Settlements?*, 62 J. INT'L ECON. 295 (2004) (arguing that although there is an accepted wisdom that withdrawn antidumping petitions are a signal of collusion, upon analysis of monthly import data, such collusion is infrequent).

[241] Pierce, *supra* note 238, at 726.

America.[242] Their plan was both ingenious and effective: the three U.S. producers refused to sell at below-cartel prices.[243] Consequently, Asian and South American producers quickly gained market share by selling at lower prices. The U.S. producers' consequential loss in market-share provided them with an "ideal" record to support antidumping and countervailing duties complaints, which cartel members promptly filed in both the United States and the European Community.[244] The cartel's complaints were successful, effectively precluding non-cartel producers from five countries from competing in those two markets, and significantly raising the price of ferrosilicon in both places.[245] Eventually, however, the United States learned of the cartel action and removed the antidumping measures.[246]

In conclusion, while there is a certain amount of support for the criticism leveled at trade remedies, this criticism can largely be rebutted by tweaking those remedies. For example, the term "unfair trade" is a misnomer because the importer's behavior lacks any resemblance to the FTC Act's definition of unfair competition.[247] Additionally, the remedies themselves generally run counter to the freer market principle of the WTO–especially antidumping and safeguards measures–and governments face a tremendous amount of political pressure at home to protect or advance domestic industries. As long as the imposition of such measures is transparent and faces time limits as required by WTO rules, the damage inflicted on the freer market principle is limited, as one can see by comparing the estimated costs of antidumping measures as against the increase in global trade of goods post-1994.[248] Furthermore, while antidumping calculations necessarily involve unjustified comparisons and inaccurate calculations, if the WTO panels and Appellate Body continue to interpret the Agreement rules narrowly, then again, such measures are likely to inflict only limited damage. Finally, while cartelization is theoretically encouraged by the availability of antidumping actions, as long as nations are able to impose antitrust measures against such cartels, again the possibility of damage to a freer global market is limited. Part VII will provide a further defense of unfair trade remedies.

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[242] *Id.* at 726.

[243] *Id.* at 727.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *See* discussion accompanying *supra* note 41.

[248] Compare text accompanying *supra* notes 231–32 (discussing cost of antidumping measures in United States of $500-800 million/year) to text accompanying *supra* notes 23–25 (discussing increase in global trade of goods from $6 trillion to $10 trillion in the first ten years of the WTO).

VII. CONTEXTUAL DEFENSE OF TRADE REMEDIES: NECESSARY AND NOT SO EVIL

A. Long-term Effect of WTO Limitations

Even though antidumping and safeguards are by nature protectionist, it is unlikely that this body of law will be repealed anytime in the near future, because of the widespread and largely unjustified premise that the free market is subject to failure and must be "corrected" at times by governmental oversight. Although it might be ideal to dump antidumping as a remedy,[249] this is unlikely to happen. Nevertheless the potentially deleterious effect of such measures is offset by three realities: 1) the WTO rules allow them only under very limited conditions and for a limited period of time, 2) as discussed previously, jurisprudence from Panel Reports and the Appellate Body has strengthened those limitations, and 3) the use of unfair trade remedies is driven by market participants and is therefore subject to the ebbs and flows of normal market behavior.

The number of antidumping measures put in place has leveled off, as has the number of initiations: after a spike in 2001 (during a recession that resulted after the Asian financial crisis which began in 1998), the number of initiations has receded as the world economy has heated up. Thus, while there were a total of 313 initiations in 2001, the number has consistently decreased since then and was down to 163 initiations in 2006.[250] The number of measures in place is relatively stable: 1,434 in 2001 and 1,502 in 2006. Safeguards and CVD measures show similar patterns.[251] As one would expect, during a recession, industries are more threatened by imports, and therefore more likely to apply for a trade remedy, but are less likely to do so during a period of growth. Thus, while antidumping, countervailing duty, and safeguards remedies have a negative effect on competition, they are expensive and difficult to use, and thus assert only a limited drag on global commerce.

The WTO sunset review provision anticipates that antidumping measures will be in place for a maximum of approximately five years. In 1998, the Congressional Budget Office concluded that U.S. antidumping measures before implementation of the WTO sunset review tended to last

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[249] *See* Jorge Miranda, *Should Antidumping Laws be Dumped?*, 28 LAW & POL'Y IN INT'L BUS. 255, 288 (1996) (concluding that antidumping "laws play an important role in sustaining trade reform, which arguably (through 'trade diversion') has [sic] a smaller welfare cost than relief through alternative measures").

[250] See graphs 5 & 6, *supra* Part V.A.3.

[251] See graphs 1–4, *supra* Part V.A.1–2.

much longer than those imposed by any other country: 10.6 years on average.[252] The United States started implementation of sunset reviews in 2000,[253] and the Congressional Budget Office was able to incorporate that year's surge of sunset reviews into its analysis.[254] In 2001, the median duration of active measures from 1994 to date was 7.0 years, but more than one in five U.S. measures had been in effect for ten or more years, one in nine had been in effect for fifteen or more years, and one measure was in effect for more than twenty-eight years.[255] By comparison, Canada had a median of 3.4 years, the European Union 3.5 years, and New Zealand 3.1 years.[256] Research fails to disclose current statistics on the U.S. duration rate, but considering the high number of measures in place (292 in 2006, down from 300 in 2000) as compared to the low number if initiations for the past six years (averaging twenty-seven initiations[257]), it seems safe to assume that U.S. sunset reviews are resulting in terminations to bring the median duration closer to the WTO five-year prescription, though perhaps not as quickly or efficiently as possible.

B. The Effect of Supply and Demand Rules on Trade Remedy Measures

In addition to the limitations posed by the WTO Trade Remedy agreements, normal market pressures can force countries to reduce or repeal measures already in place. Two examples will be used to demonstrate this effect, one from a developing country and the other from a developed country, both involving commodities that are used globally: Portland gray cement and steel.

1. The Cement Industry: China, Egypt, and Jamaica

Production in China and Egypt is extensive and growing. The world's largest cement-producing country is China, which has the capacity to produce 800 million tons of cement each year due to a number of recently-built plants.[258] Egypt has expanded its cement production[259] in a "Special

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[252] CONG. BUDGET OFFICE, *supra* note 152, at 8.

[253] *Id.* at 8, 27.

[254] *Id.* at 27.

[255] *Id.* at 42.

[256] *Id.*

[257] *Id.* at 23.

[258] WANG HENGCHEN ET AL., CLEANER PRODUCTION AND CIRCULAR ECONOMY FOR CEMENT INDUSTRIAL SECTOR IN CHINA 1 (Oct. 2004), http://www.chinacp.org.cn/eng/cppub/cement/Wang2004.pdf (last visited Mar. 8, 2008).

[259] *Rasheed: Egypt ranks 5 in cement export*, ARABIC NEWS, Nov. 1, 2004, *available at* http://www.arabicnews.com/ansub/Daily/Day/041101/2004110121.html (reporting that Egypt's cement industry witnessed a big leap in 2004 to an estimated at thirty-seven million tons a year, ten million of which are exported).

Economic Zone," in which the government provides tax and other incentives in an effort to encourage foreign investment.[260] These incentives may amount to an indirect subsidization of the export of cement and are against WTO provisions.

In contrast, Jamaica privatized its sole cement factory, Caribbean Cement Company, Ltd. in the late 1990s. Caribbean Cement now employs 250 people and supplies 90% of the cement used in Jamaica's buildings and roads.[261] In 1998, the financial markets in Asia began to collapse, leaving Chinese and Egyptian cement manufacturers an oversupply. Thus, in order to keep operating at capacity, they needed to find a market for the excess. Consequently, they started selling cement around the world. In 2003, Caribbean Cement believed that its ongoing process of renovation was jeopardized by the low prices of imported Chinese and Egyptian Cement and pursued an antidumping application against Chinese cement,[262] a countervailing duty application against Egyptian cement,[263] and a safeguards application against all other potential importers.[264] Two years later, China decided to build a massive dam across the Yangtze River (the "Three Gorges Dam"), and started using most of its own cement production as well as importing cement.[265] At the same time, hurricane damage in the United States resulted in increasing demand for cement.[266] The result was a worldwide shortage in cement and rising prices. Faced with a severe shortage, the Jamaica Trade Board removed import duties for one year

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[260] Luciano Loffredo, *Policies for Business in the Mediterranean Countries: The Arab Republic of Egypt* 6–7 (Mar. 7, 2005) (analyzing some of the incentives provided by the Special Economic Zone project, which dates from 1997), *available at* http://unpan1.un.org/intradoc/groups/public/documents/CAIMED/UNPAN018699.pdf; Adam Morrow, American Chamber of Commerce in Egypt, *Welcome to the New World Order*, BUS. MONTHLY (Dec. 2002), *available at* http://www.amcham.org.eg/Publications/BusinessMonthly/December%2002/feature.asp.

[261] Caribbean Cement Company Ltd., Carib Cement Corporate Profile, http://teleios.co.tt/caribcement/about (last visited Mar. 8, 2008). In 2003, the author helped prepare antidumping, countervailing duty, and safeguard applications for Carib Cement.

[262] *See* JAM. ANTIDUMPING AND SUBSIDIES COMM'N, STATEMENT OF REASONS (Dec. 16, 2003), http://www.mct.gov.jm/SOR.AD-01.2003.Initiation.pdf.

[263] *Anatomy of a Cement Controversy*, THE JAM. OBSERVER, Dec. 31, 2003, http://www.jamaicaobserver.com/magazines/business/html/20031230t180000-0500_53677_obs_ anatomy_of_a_cement_controversy.asp (last visited Mar. 8, 2008).

[264] *Twenty-six Percent Safeguard Duty on Imported Cement*, THE JAM. OBSERVER, July 21, 2004, http://www.jamaicaobserver.com/magazines/business/html/20040720t220000-0500_63165_obs_____safeguard_duty_on_imported_cement.asp (last visited Mar. 8, 2008).

[265] *See Demand for Cement in China to Reach 1.3 Billion Metric Tons in 2010*, MARKETWIRE, Oct. 12, 2006, http://www.marketwire.com/mw/release.do?id=701420&k=cement.

[266] Roy A. Grancher, *U.S. Cement: Massive Reinvestment for Capacity Addition*, CEMENT AMERICAS, Sept. 1, 2006, http://cementamericas.com/mag/cement_us_cement_massive/index.html.

starting May 17, 2006, thus canceling the antidumping and safeguards duties imposed only two and three years prior.[267]

2. The U.S. Steel Industry

As in developing countries like Jamaica, market and political pressure to repeal antidumping measures in the face of increased demand may be present in large, developed countries like the United States. Although the U.S. steel industry once symbolized the might of American industrial power, it lost its competitive edge against foreign steel producers during the latter half of the twentieth century.[268] The reasons for this fall were several. For one thing, U.S. producers faced the highest unit labor costs in the world from as early as 1958, and labor costs continued to increase to the end of the century.[269] Furthermore, because U.S. producers had enjoyed dominance in the domestic market for a long time through oligopoly, they did not make efforts to modernize their aging facilities.[270] In the intervening time, foreign steel producers built better facilities employing advanced production technologies, began producing large amounts of steel, and consequently by 2001 steel prices dropped to a twenty-year low.[271] Because they could not compete against foreign steel, eighteen U.S. steel producers filed for bankruptcy between January 1998 and June 2001.[272]

Consequently, U.S. steel producers brought their considerable political clout to bear and applied for and were granted protection through trade remedies, including both antidumping actions and countervailing duties.[273] The federal government also granted the steel industry a substantial amount of aid in the form of pension bailouts, tax refunds, environmental regulation exemption subsidies, "buy American" requirements, and emergency loan guarantee schemes.[274] Foreign producers objected, petitioning the WTO's dispute resolution body and filing retaliatory measures that nearly precipitated a global trade war in the steel industry.[275] On March 20, 2002, the Bush Administration applied safeguard measures to protect U.S. steel from all imports by increasing tariffs of up to 30% *ad valorem*[276] as well as

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[267] JAM. MINISTRY OF ENERGY, MINING AND TELECOMM, ISSUES RELATED TO SHORTAGE OF CEMENT 15 (June 20, 2006), *available at* http://www.mct.gov.jm/Ministry%20Papers%202006/Ministry%20Paper%20-%20Cement%20Final%20June%2020,%202006.pdf.

[268] Y.S. Lee, *Test of Multilateralism in International Trade: U.S. Steel Safeguards*, 25 NW. J. INT'L L. & BUS. 69, 72 (2004).

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.* at 73.

[273] *Id.*

[274] Lee, *supra* note 268, at 73.

[275] *Id.* at 75.

[276] *See* Memorandum: Action Under Section 203 of the Trade Act of 1974 Concerning

applying quotas to a range of steel imports.[277]

The U.S. steel safeguard was met with a firestorm of negative reaction. Two days after the safeguard measure was announced, the European Community filed a complaint with the WTO Dispute Settlement Body; Japan, South Korea, Switzerland, Venezuela, Norway, and China joined the complaint.[278] When consultations between the United States and the complainants failed, the WTO established a dispute settlement panel to determine whether the safeguard measure complied with GATT rules.[279] Ultimately, the Appellate Body found that the steel safeguard measure was non-compliant,[280] but it took two years for the WTO process to be completed. Within twenty days of the Appellate Body decision, U.S. President Bush withdrew the safeguard measure because the industry had taken advantage of the protective period to retool and revamp its aging plants and no longer needed such measures.[281]

However, the repeal of the steel safeguard measure is not the end of the story. Although the safeguard was repealed, antidumping and CVD measures were not, having survived sunset review.[282] Thus, steel consumers argued that the price of steel imported into the United States remained unnaturally high due to unfair trade remedies.[283] U.S. automakers requested duties be rolled back because of competition with foreign automobiles made more cheaply with steel sold at lower non-U.S. prices.[284] As of the time of this writing, despite the repeal of the safeguard, the price of hot and cold-rolled steel used in automaking continues to rise in the U.S., due to a significant increase in world-wide demand and also perhaps to a consolidation of steel-manufacturers.[285] Thus, market forces can assert political pressure to limit, terminate, or render irrelevant the imposition of trade remedies.

Certain Steel Products, 67 Fed. Reg. 10,593 (Mar. 5, 2002).

[277] *See* To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products, 67 Fed. Reg. 10,553 (Mar. 5, 2002).

[278] Lee, *supra* note 268, at 71.

[279] *Id.*

[280] Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 172, WT/DS248, 249, 251, 252, 253, 254, 258, 259/AB/R (Nov. 10, 2003).

[281] *See* Proclamation No. 7741, *supra* note 108.

[282] *ITC Continues Hot-Rolled Steel Duties Despite Consumer Complaints*, INSIDE U.S. TRADE, Apr. 22, 2005, sec. 16, *available at* 2005 WLNR 6287054.

[283] *Id.*

[284] *See Auto Suppliers Applaud Congressional Resolution on Steel Hearings*, THE AUTO CHANNEL, Feb. 10, 2005, http://www.theautochannel.com/news/2005/02/10/028331.html; *see also Japan, U.S. Automakers Seek End to U.S. Antidumping Duties on Steel Sheets*, JIJI PRESS ENG. NEWS SERV. (Sept. 8, 2006), *available at* 2006 WLNR 15620661.

[285] Tom Stundza, *Raw Materials Costs are Boosting Steel Sheet Prices*, PURCHASING, Jan. 9, 2008, *available at* http://www.purchasing.com/article/CA6518710.htm.html.

C. WTO Controversy

While the WTO agreements have resulted in a relatively liberalized world market in goods, trade in agricultural commodities has not been similarly liberalized for a number of complicated reasons, chief among them being problems in reaching an accord on how to scale back agricultural subsidies.

In order to be allowed to accede to the benefits offered by the WTO's freer trade policies, members had to agree to repeal all direct and indirect limitations on the import of goods except for the scheduled tariffs.[286] As mentioned previously, the CVD Accord prohibits two narrow categories of subsidies: those contingent upon export and those contingent upon the use of domestic over imported goods.[287] Actionable subsidies are "countervailable" if they cause material injury to domestic industry.[288] Additionally, other subsidies that provide benefits to a specific enterprise or industry, even if not prohibited, may nonetheless be subject to countervailing duties if they cause "serious prejudice" to another WTO member.[289]

Subsidies in the agricultural arena proved to be a contentious issue. Developed countries have a large number of agricultural support programs and during the Uruguay Round found it almost impossible to reach an

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[286] *See* Trade Agreements Act of 1979, 19 U.S.C. § 2501 & ff (1994) (statutes promulgated to enable GATT accords & tariff schedules); *see also* World Trade Organization, A Summary of the Final Act of the Uruguay Round, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last visited Mar. 8, 2008):

> "The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", [sic] signed by ministers in Marrakesh on April 15, 1994 is 550 pages long and contains legal texts which spell out the results of the negotiations since the Round was launched in Punta del Este, Uruguay, in September 1986. In addition to the texts of the agreements, the Final Act also contains texts of Ministerial Decisions and Declarations which further clarify certain provisions of some of the agreements.
>
> The Final Act covers all the negotiating areas cited in the Punta del Este Declaration with two important exceptions. The first is the results of the "market access negotiations" in which individual countries have made binding commitments to reduce or eliminate specific tariffs and non-tariff barriers to merchandise trade. These concessions are recorded in national schedules that form an integral part of the Final Act. The second is the "initial commitments" on liberalization of trade in services. These commitments on liberalization are also recorded in national schedules.

[287] CVD Agreement, *supra* note 32, art. 3.1.

[288] *See id.* art. 15 n.45.

[289] *Id.* art. 5(c).

accord on how to scale back those subsidies.[290] Accord has been difficult to reach as this is a highly emotional subject worldwide—large subsidies to agriculture in the United States and European Union are historically based on concerns about food security, quality, past food shortages, and the special place farms and farmers have in a society's history.[291] The resulting compromise under the Agreement on Agriculture permits the use of export subsidies, in contradiction of the CVD Agreement, but only to the extent that they were listed in the subsidizing WTO member's schedule (thus adding transparency), and were not increased in amount.[292] Furthermore, Article Thirteen of the Agreement on Agriculture provided a grace period for export subsidies: until the end of the "peace period" on January 1, 2004, scheduled export subsidies were exempt from actions based on the prohibitions set forth in the Countervailing Duties Agreement's Article Three; thereafter, Members could challenge such agricultural subsidies.[293]

It was anticipated at the Uruguay Round that future rounds of negotiations would lead to stronger and more specific agreements on how to liberalize agricultural trade through reduction of subsidies, but this hope was dashed during the September 2003 Doha Round at Cancun when developing countries opposed a U.S. and EU joint proposal on the grounds that its agricultural liberalization provisions were insufficient.[294] Overlapping these negotiations, in February 2003, Brazil requested the establishment of a dispute settlement panel, asserting that certain subsidies granted to U.S. cotton farmers were causing serious prejudice to Brazilian cotton producers.[295] That dispute resulted in a September 2004 panel report finding that some of the complained-of subsidies were in violation of the CVD agreement.[296] The United States scaled back some of the cotton subsidies that the Panel found objectionable before the WTO's July 1, 2005 deadline,[297] and then promised at the December 2005 Doha meeting in Hong Kong to terminate cotton export subsidies.[298] Nevertheless, exact

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[290] *See* MELAKU GEBOYE DESTA, THE LAW OF INTERNATIONAL TRADE IN AGRICULTURAL PRODUCTS: FROM GATT 1947 TO THE WTO AGREEMENT ON AGRICULTURE 207, 211 (2002).

[291] *See* Stewart, *supra* note 59, at 704.

[292] *See* Agreement on Agriculture, art. 3.3 & 8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 33 I.L.M. 1125 (1994).

[293] Karen Halverson Cross, *King Cotton, Developing Countries and the 'Peace Clause': the WTO's US Cotton Subsidies Decision*, 9 J. INT'L ECON. L. 149, 153, 165 (2006).

[294] *Id.* at 151–52.

[295] Panel Report, *United States—Subsidies on Upland Cotton: Report of the Panel*, ¶¶ 1.1 & 1.2, WT/DS267/R (Sept. 8, 2004).

[296] *See id.*

[297] *See* Bruce Odessey, U.S. Dept. of State, *United States Partially Complies with WTO Cotton-Subsidy Ruling*, July 1, 2005, http://usinfo.state.gov/ei/Archive/2005/Jul/01-228642.html.

[298] *See* Ministerial Declaration, Doha Worke Programme (Dec. 18, 2005), WT/Min(05)

details and modalities of the liberalization of trade with regard to agricultural subsidies remains a sticking point in WTO negotiations, which were temporarily suspended in mid 2006.[299] As of this writing, informal negotiations are continuing, but agreement has not yet been reached.[300]

The United States has provided federal subsidies for agriculture since Roosevelt's New Deal.[301] Originally the Agricultural Adjustment Act was intended to provide relief for American farmers who had suffered from the volatility of market prices for agricultural commodities,[302] but it has grown substantially since then. Under successive legislation, cotton farmers in 2003 were eligible for six types of subsidies: 1) Marketing loan payments in which farmers could use their cotton crop as collateral for a government loan and if the world price for cotton fell below a certain threshold, they could repay the loan at the lower price and retain the difference;[303] 2) direct payments under the Farm Security and Rural Investment Act of 2002, under which the government pays farmers a set price for the cotton;[304] 3) counter-cyclical payments and other emergency assistance designed to protect cotton farmers against a decline in cotton prices;[305] 4) crop insurance;[306] 5) export credit guarantees to encourage exports of agricultural products to

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/DSC (Dec. 22, 2005); Rob Portman, America's Proposal to Kick-Start the Doha Trade Talks, FIN. TIMES, Oct 10, 2005, at 15; Sungjoon Cho, *Half Full or Half Empty?: The Hong Kong WTO Ministerial Conference Has Delivered an Interim Deal for the Doha Round Negotiation*, ASIL INSIGHT, Dec. 29, 2005, *available at* http://www.asil.org/insights/2005/12/insights051229.html.

[299] *See* Press Release, World Trade Organization, Talks Suspended: Today There Are Only Losers (July 24, 2006), http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm (WTO Director-General Pascal Lamy declaring suspension of the Doha round due to difficulties in reaching agreement on how to handle domestic support (i.e. subsidies) and agricultural issues).

[300] *See, e.g.*, Press Release, World Trade Organization, "We are Closer to Our Goal but It is Not Yet Done"—Lamy (Dec. 18, 2007), http://www.wto.org/English/news_e/news07_e/tnc_chair_report _dec07_e.htm. Ambassador Crawford Falconer, chairperson of the agricultural negotiations, circulated a draft "modalities" paper showing proposed formulas to cut tariffs and trade-distorting subsidies in agriculture, as part of the Doha round of negotiations. *See also* World Trade Organization, Chairperson's Texts 2008, http://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm (last visited Mar. 8, 2008); *New Agriculture Papers Leave Open Key Questions on Market Access*, 26 INSIDE U.S. TRADE, Jan. 11, 2008, *available at* 2008 WLNR 609366 (highlighting new working documents released on Jan. 4, 2008 by the chairman of the WTO agriculture negotiations).

[301] *See* Agricultural Adjustment Act of 1933, 7 U.S.C. §§ 601–26 (2000).

[302] *See* GENE SMILEY, RETHINKING THE GREAT DEPRESSION 82–83 (2002).

[303] *See* Cross, *supra* note 293, at 155.

[304] *Id.* at 154.

[305] Panel Report, *United States—Subsidies on Upland Cotton*, ¶ 7.223, WT/DS267/R, (Sept. 8, 2004) (*adopted* Mar. 21, 2005).

[306] *Id.* ¶ 7.456.

foreign countries where financing may not be available;[307] and 6) "step 2" payments, which encourage U.S. buyers to purchase U.S. cotton by subsidizing sales when the price of U.S.-grown cotton exceeds a benchmark price.[308] It was the last two types of subsidies—the marketing loan and "step 2" payments—that the WTO Panel found to be actionable as export and domestic preference subsidies.[309] Notably, the Cotton Panel opinion was one of only two WTO decisions finding "serious prejudice" resulting from the use of domestic subsidies, and is the only WTO decision to involve a challenge of domestic agricultural subsidies.[310] The United States filed an appeal, but while the Appellate Body disagreed with some of the reasoning, it upheld the panel's findings in all significant respects.[311]

The legalities and classification of subsidization under the WTO Agreements are complicated, but in fact, these types of subsidies have had enormous effects both domestically and internationally. Although originally agricultural subsidies were intended for poor Depression-Era farmers at the mercy of wind and weather, today the vast majority are given to a very small percentage of U.S. farms: of the subsidy payments made to U.S. cotton producers between 1995 and 2003, 80% of the funds were paid to only 10% of the producers, each of whom received on average $500,000 per year.[312] In one year, the United States government allocated almost $44 million in cotton subsidies to ten agribusinesses.[313] As a result of the intense subsidization brought on by intense lobbying, U.S. cotton farmers are protected from international competition and have become inefficient producers: the average cost to produce a pound of cotton in the United States in 2001 was almost three times higher than that of other major cotton producing countries such as China, Brazil, and Benin.[314]

As corrosive as these subsidies have been on the efficiency of the U.S. cotton industry, they have allegedly had devastating effects on cotton farmers especially in sub-Saharan Africa's least developed countries where over 10 million people depend directly on cotton production.[315] Contrary to

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[307] *See id.* ¶ 7.240 (citing Agricultural Trade Act of 1978, 7 U.S.C. § 5622(g) (2000)).

[308] *Id.* ¶ 7.210; *see also* Cross, *supra* note 293 at 157.

[309] Panel Report, *supra* note 305, ¶ 7.210.

[310] *See id.* The other decision is Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) (*adopted* July 23, 1998) (finding that, allowing for certain physical differences, domestically produced automobiles undercut the price of EC-produced cars by over 30%).

[311] *See* Panel Report, *supra* note 295, ¶¶ 377, 458, 623–26.

[312] Envtl. Working Group, Farm Subsidy Database, http://farm.ewg.org/farm /index.php (last visited Mar. 8, 2008).

[313] Cross, *supra* note 293 at 159.

[314] Jasper Womach, *Cotton Production and Support in the United States* 13 fig.10 (Cong. Research Serv., RL 32442, June 24, 2004).

[315] Kevin C. Kennedy, *The Incoherence of Agricultural, Trade, and Development Policy*

some U.S. analysis positing that subsidized goods from developed countries benefit the developing countries that buy them, the market distortion caused by U.S. subsidized cotton has caused devastating harm to countries such as Benin, Burkina Faso, Mali, Chad, and Togo, because they have to compete with the artificially low cotton prices on the world market:

> The adjusted world price for cotton in mid-2004 was nearly $.56 per pound, the highest it has been in seven seasons, but still down from its 1994-1995 high of over $.76 per pound. Cotton growers in Benin, Burkina Faso, and Mali increased the quantity of their cotton exports between 1994-1995 and 2001-2002, but saw their export earnings from cotton decline even as the quantities of their cotton exports increased during the same seven-year period. In fact, "[o]ver 90% of the cotton produced in the WCA countries is for export." From 1999 to 2002, their production increased by 14%, but their export earnings fell by 31%.[316]

D. Overall Costs of Agricultural Subsidies

It is estimated that between 1995 and 2003, the United States government spent over $2 billion in payments under the cotton "Step 2" program alone,[317] and the United States is not the worst offender. U.S. farm subsidies are approximately one-third of the European Union's, which subsidizes cows at the rate of $2.20 per day (more than the daily living expenses of many people in least developed countries).[318] It is estimated that developed countries pay more than $1 billion in agricultural subsidies per day.[319] Studies have estimated that eliminating such agricultural trade barriers would provide an economic benefit to world trade of between $50 billion and $185 billion, and expanding this analysis to include the effects of liberalization on the rate of productivity growth would raise these estimates by amounts ranging from 50% to more than 100%, depending on the study.[320]

According to the guesstimate given above, the worldwide cost of antidumping procedures is somewhere between $10 and $20 billion annually. This is a drop in the bucket compared to the $50 to $185 billion that the unlimited agricultural subsidies are costing global consumers. Rather than focusing on eliminating antidumping measures, the focus

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for Sub-Saharan Africa: Sowing the Seeds of False Hope for Sub-Saharan Africa's Cotton Farmers?, 14 KAN. J.L. & PUB. POL'Y 307, 315 (2005).

[316] *Id.*

[317] Cross, *supra* note 293 at 157.

[318] Editorial, *Cow Politics*. N.Y. TIMES, Oct. 27, 2005, at A30.

[319] *Id.*

[320] CONG. BUDGET OFFICE, THE EFFECTS OF LIBERALIZING WORLD AGRICULTURAL TRADE: A SURVEY 3 (2005).

should be on reaching accord with regard to the further limitation and phasing-out of agricultural subsidies as was done previously with regard to goods through the WTO agreements.

VIII. CONCLUSION

Although antidumping and the other 'unfair' trade remedies are inherently anti-market and expensive to pursue, they are limited in scope and application. Furthermore, because the WTO requires that countries report both initiation and measures in force on a regular basis, they are transparent and therefore more vulnerable to challenge by other Members. When challenged, Panels and the Appellate Body both regard such measures suspiciously, and hold against them on sometimes overly vigorous parsing of the applicable Agreement language. This negative bias is in keeping with the WTO's freer market policy. Furthermore, the negative findings put strong and generally effective pressure on an offending country to repeal the nonconforming measure. Therefore, when viewed in context, trade remedies have helped develop an international rule of law with regard to trade of goods.

The WTO freer market policy, its encouragement of international transparency, and the resulting gradual reduction in tariffs have been productive—especially with regard to the international trade of goods. Progress now needs to be made with regard to reduction of agricultural subsidies so that global trade in agricultural products can show similar growth. Multilateral agreement is difficult to achieve due to the growth of the WTO and the complexity and controversial nature of the issue. Despite the fact many commodity groups would just as soon prefer that the Doha round "went away" because of concerns that the U.S. might give up more in domestic agricultural subsidies reductions than it will gain in access to foreign markets,[321] the resultant increase in global trade of agricultural commodities is ultimately likely to be similar to that previously demonstrated with regard to goods. In contrast with the purported negative effects of global warming, the WTO has proven that the rising tide of global trade, indeed, floats most (if not all) boats.

[321] *See* INSIDE U.S. TRADE, *supra* note 300.